111-200

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 818.

CHARLES P. CHOUTEAU AND JULIA MAFFITT, APPELLANTS,

vs.

CHARLES GIBSON.

IN ERROR TO THE SUPREME COURT OF THE STATE MISSOURI.

FILED MAY 14, 1881.

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a The United States of America to Charles Gibson, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Charles P. Chouteau and Julia Maffitt are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas A. Sherwood, chief-justice of the supreme court of the State of Missouri, this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and eighty-two.

T. A. SHERWOOD,
Chief-Justice of the Supreme Court of the State of Missouri.

b UNITED STATES OF AMERICA,
Western District of Missouri, ss:

hereby acknowledge due service of the within citation, this day of , A. D. 187 .

Attorney for Defendant in error.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

I return on this writ that I have served the same by delivering a copy thereof to the within-named Charles Gibson, defendant in error, on the 2nd day of December, 1882, in the city of St. Louis, in the above district.

PETER COSTER,
U. S. Marshal,
By O. K. WHEELER,
Deputy.

Fees: 1 service, $2; 3 miles .18—$2.18.

(Indorsed:) United States court, western district of Missouri. C. P. Chouteau & Julia Maffitt, plaintiffs in error, vs. Charles Gibson, defendant in error. Citation. Filed 9th day of Dec., 1882. Henry W. Ewing, clerk.

c UNITED STATES OF AMERICA:

The President of the United States to the honorable the justices of the supreme court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles P. Chouteau and Julia Maffitt, plaintiffs and appellants, and Charles Gibson, defendant and respondent, wherein was drawn in question

the validity of a statute or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Charles P. Chouteau and Julia Maffitt, plaintiffs and appellants, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1883, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 28th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, eastern division, dated as aforesaid.

[SEAL.]

H. C. GEISBERG,
Clerk Circuit Court United States,
Western District of Missouri.

Allowed by—

T. A. SHERWOOD,
Judge, C. J. S. C. Mo.

d

Return to writ.

Supreme court of Missouri.

UNITED STATES OF AMERICA, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 30th day of December, A. D. 1882.

[SEAL.] HENRY W. EWING, *Clerk.*

(Indorsed:) No. C. P. Chouteau & Julia Maffitt vs. Charles Gibson. Writ of error to the supreme court of the State of Missouri. Filed 9th day of Dec., 1882. Henry W. Ewing, clerk.

e STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 28th day of March, A. D. 1879, there was filed in the office of the clerk of the supreme court of Missouri a transcript which is in the words and figures following, to wit:

1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 15th day of February, A. D. 1878, there was filed in the office of the clerk of the St. Louis court of appeals a transcript in the words and figures following, to wit:

Petition.

In the circuit court of St. Louis Co., St. Louis Co., Missouri.

CHARLES P. CHOUTEAU AND JULIA MAFFITT, plaintiffs,
vs.
CHARLES GIBSON, DEFENDANT.

The plaintiffs, Charles P. Chouteau and Julia Maffitt, state that on the 30th of November, 1815, New Madrid certificate No. 150 issued to said O'Carrol, or his legal representatives, authorizing him or them to locate 640 acres of land. A copy thereof is filed herewith, marked "Exhibit No. 1."

That November 29th, 1805, said O'Carrol conveyed the 640 acres of land situated in New Madrid County, Missouri, which had been injured
2 by the earthquakes, and in lieu of which said certificate No. 150 was issued to George Ruddle, his heirs and assigns; said conveyance was made in consideration of four hundred dollars paid to said O'Carrol, who then and there, by said deed, covenanted with said Ruddle to warrant and defend the title to said lands generally. Said deed was duly acknowledged on the 29th day of November, 1805, and recorded in New Madrid County, Mo., on the 18th day of March, 1809. A copy of said deed is filed herewith, marked "Exhibit No. 2," the original not being in the power of plaintiffs.

That on the 7th day of March, 1816, after said land had been injured by the earthquakes, the said George Ruddle, in consideration of five hundred and twenty-five dollars paid to him by James Tanner and Andrew P. Gillespie, conveyed to said Tanner and Gillespie, their heirs and
3 assigns, an undivided interest in said tract of five hundred and fifty arpents. Said last-mentioned deed stated that said tract had been materially injured by earthquakes, and that the owner was entitled by law to locate other lands in lieu thereof, and transferred to said Tanner and Gillespie all the privileges and benefits conferred by the act of Congress in respect to such injured lands; and said Ruddle covenanted therein with said grantees to warrant and defend the same to them generally. A copy of said last-mentioned deed is filed herewith, marked "Exhibit No. 3," the original not being in the power of plaintiffs.

That on the 17th day of October, 1816, said Andrew P. Gillespie, in

consideration of the sum of one hundred and ninety dollars to him paid by James Tanner, granted, bargained, and sold to said Tanner all his right, title, interest, and claim in and to said O'Carrol tract, and
4 covenanted therein to warrant and defend the claim that was in him, said Gillespie, to said Tanner, generally, against himself, his heirs, and all persons. A copy of said last-mentioned deed is filed herewith, marked "Exhibit No. 4." Said last-named deed was duly acknowledged October 18th, 1816, and was duly recorded 18th day of October, 1816. The original is not in the power of the plaintiffs.

That on the 16th day of May, 1818, said George Ruddle and Theodosia his wife, in consideration of five hundred dollars paid them by Andrew P. Gillespie, granted, bargained, and sold to said Gillespie, his heirs and assigns, an undivided interest of two hundred arpents in the said O'Carrol tract; and the said George Ruddle therein covenanted to warrant and defend the title thereto to said Gillespie, his heirs and assigns. A
5 copy of said last-mentioned deed is filed herewith, marked "Exhibit No. 5," the original not being in the power of the plaintiffs. The same was duly proved to have been executed May 26th, 1818, and duly recorded June 8th, 1818.

That on the 1st day of June, 1818, the said Andrew P. Gillespie, in consideration of ten dollars paid to him by James Tanner, granted, bargained, and sold to said Tanner, his heirs and assigns, the said two hundred arpents in said O'Carrol claim. A copy of said last-mentioned deed is filed herewith, marked "Exhibit No. 6," the original not being in the power of the plaintiffs.

Said last-mentioned deed was duly acknowledged June 1st, 1818, and was duly recorded 9th day of June, 1818. That afterwards, in the year 1819, the said James Tanner, in consideration of the sum of twelve hundred and eighty dollars, paid to him by Christian Wilt, granted, bar-
6 gained, and sold, and did grant, bargain, and sell by deed to him, said Wilt, his heirs and assigns forever, said six hundred and forty acres of land, with the right and privilege of locating the same according to act of Congress of February 17th, 1815, for relief of those who suffered by earthquakes; reciting in said deed that the same land was the said O'Carrol tract, since that time lawfully conveyed by good chain of title to said Tanner, who, as legal representative of said O'Carrol, accepted the relief offered by said act of Congress and procured from the recorder of land titles in lieu thereof a certificate, No. 150, authorizing said O'Carrol or his legal representatives to locate the same, and by said deed said Tanner authorized and empowered said Wilt to locate said land, and covenanted with said Wilt that he, said Tanner, his heirs and represent-
7 atives, would warrant and forever defend the right and title to said land wherever located, according to the lines and boundaries thereof, as the same might be established by final survey, to said Wilt, his heirs and assigns, in fee-simple, forever, together with all and singular of the premises, appurtenances, and advantages thereunto in anywise belonging; to have and to hold the said claim and six hundred and forty acres of land, with the premises aforesaid, to said Wilt, his heirs and assigns forever, free and clear of and from all manner of adverse titles or claims to same or any part thereof, and every kind of embarrassment whatever; and said Tanner further covenanted with said Wilt in said deed that he, said Tanner, his

heirs and representatives, should and would at any time when thereto requested by said Wilt, his heirs or assigns, after said claim was le-
8 gally located and a final survey thereof made and boundaries established, make to him, said Wilt, his heirs or assigns, a new general warranty deed, describing the particular land on which said claim might be located by final survey thereof made and its boundaries established. A copy of said last-mentioned deed, the original not being in the power of defendants, is filed herewith, marked "Exhibit No. 7." The said deed to Wilt was duly acknowledged, and was recorded in the office of the recorded of St. Louis County, Mo., March 25th, 1819.

That on the 8th day of November, 1816, the said Christian Wilt, with the consent of the legal representatives of said O'Carrol, gave notice of the location of said claim under said certificate No. 150, as follows:

"Christian Wilt, for James Y. O'Carrol, or his legal representa-
9 tives, enters 640 acres of land in virtue of a certificate dated November 30th, 1815, and issued by Frederick Bates, esq., recorder of land titles for the Missouri Territory: beginning at the north-westerly corner of what is called and known by the name of the prairie or Barrier Denoyer tract or surveys of land, which said tract includes a number of surveys or parcels of land claimed by divers individuals, running from said point of beginning north 83½ degrees east, with the northerly boundary line of said Denoyer tract three hundred and twenty paces; thence and from the beginning north 6½ degrees west, at right angles, for the quantity of six hundred and forty acres.

"CHRISTIAN WILT."

A copy of said entry and notice of location is filed herewith, and marked "Exhibit No. 8."

On the 16th day of June, 1818, said Wilt gave another notice
10 of location or entry, in the following words, viz:

"Christian Wilt, as the legal representative of James Y. O'Carroll, enters six hundred and forty acres of land by virtue of a certificate, No. 150, dated November 30th, 1815, issued by Frederick Bates, esq., recorder of land titles, to wit: fractional section twenty in township forty-five north and range seven east, the same in which St. Louis is situated; that part of fractional section seventeen, in the same township, which lies south of the Cul de Sac field; the western half of fractional section twenty-one in the same township; and so much off from the north side of the western half of fractional section twenty-eight in the same township as will make the quantity.

"JOSEPH C. BROWN,
"For CHRISTIAN WILT."

A copy of said last-named notice of location or entry is filed here-
11 with, and marked "Exhibit No. 9."

On the foot of said last-mentioned notice of location is indorsed a certificate by said Joseph C. Brown, as deputy surveyor, as follows, to wit:

"I certify that the former location of C. Wilt on the above certificate interfered with the Cul de Sac fields. 16th June, 1818.

"JOSEPH C. BROWN, *D. S.*"

A copy of said last-mentioned certificate by said Deputy Surveyor Brown is found upon said Exhibit No. 9, and is filed herewith.

That said last-mentioned entry under said New Madrid certificate No. 150, was surveyed by said Joseph C. Brown, deputy surveyor of the United States, in April, 1818, and was returned into the office of the recorder of land titles on the 10th day of August, 1841.

The location so conveyed was as follows, to wit:

"Beginning at a stone the southwest corner of the tract in
12 Charles Gratiot's line; thence north 8 degrees 40′ east 48 chains to S. Dubriede's corner post in mound; thence south 75 degrees east 86 chains, stone corner in Chouteau's line; thence south 15 degrees west 7 chains 15 links, Chouteau's corner stone; thence south 75 degrees east 44 chains 61 links, post in mound in Chouteau's line; thence south 97 chains, post in mound; thence west 27 chains, set post in mound in line of field lands; thence north 6½ degrees east, 78 chains 35 links, stone northeast corner of field lands; thence with north line of fields lands north 83½ degrees west 113 chains, to the beginning."

A copy of said survey, with a plat thereto annexed, is herewith filed, marked "Exhibit No. 10."

That on October 26th, 1822, Joseph Hertzog, in consideration that he was indebted to Louis Devotion in the sum of nine thousand five
13 hundred and forty-nine dollars, lawful money, on a judgment obtained by said Devotion against said Hertzog, and of the indulgence received, and in order to secure said debt by deed granted, bargained, and sold to Robert Wash, his heirs and assigns, said six hundred and forty acres of land located by said Wilt for said O'Carroll, or his legal representatives, in trust, to sell the same or any part thereof for the payment of said debt, upon giving ten days' public notice of said sale, all of which, among other things in said last-named deed will appear.

The original of said deed to said Wash not being in the power of these plaintiffs, a copy thereof is filed herewith, marked "Exhibit No. 11."

The execution of said deed was duly proved November 18th, 1818, and recorded on the same day in the office of the recorder of St. Louis County, Mo.

14 That afterwards the said Robert Wash, on the 27th day of November, 1824, as the trustee under said deed of said Hertzog, in consideration of one hundred and twenty-eight dollars paid to him by Pierre Chouteau, junior, the father of these plaintiffs, sold, released, assigned, and confirmed to said Chouteau, the father, his heirs and assigns, all right, title, interest, property, and estate which he, said Hertzog, had at the date of said conveyance to said Wash in and to sixty-four acres, English measure, part and parcel of said tract of six hundred and forty acres, located by said Christian Wilt, as assignee of the certificate in the name of James Y. O'Carrol, said location being in township No. 45, range 7 east—the particulars of said entry and location and the boundaries thereof might be seen by reference to the books of the sur-
15 veyor of public lands—which tract and location had been duly conveyed by the legal representatives of said Christian Wilt to said Hertzog, and by said Hertzog to said Wash, said sixty-four acres to be taken and laid off of the western side of said location and tract of six hundred and forty acres.

The original of said last-mentioned deed not being in the power of defendants, a copy thereof is filed herewith, marked "Exhibit No. 12."

The last-named deed was duly acknowledged November 30th, 1824, and recorded in the recorder's office of St. Louis County, Mo., December 13th, 1824.

That said Joseph Hertzog was at the date of said last-named deed, and for several years after, a resident of St. Louis County, Mo., and approved said conveyance.

That Henry Clay, executor of James Morrison, deceased, recovered a judgment in the circuit court of St. Louis County, Mo., against
16 Joseph Hertzog for two thousand two hundred and eighty-five ($2,285) dollars debt, and one hundred and forty-seven ($147) dollars forty-five cents damages and costs; that December 13th, 1824, an execution of fieri facias issued upon said judgment to the sheriff of St. Louis County, Mo., and was levied upon said parcel and tract of land, containing six hundred and forty acres, located by said certificate No. 150, issued to said O'Carrol, or his legal representatives, and after due advertisement according to the statute said land was sold and conveyed by the sheriff of said county to said Clay, as executor aforesaid, and his heirs, for the sum of four hundred and fifty ($450) paid to him by said Clay.

The said sheriff's deed not being in the power of these plaintiffs, a copy thereof is filed herewith and marked "Exhibit No. 13." The
17 same was duly acknowledged May 17th, 1825, and recorded in St. Louis County, Mo., June 7th, 1825.

That the said Henry Clay, executor of said Morrison, after his purchase at said sheriff's sale, contracted to sell the said tract of six hundred and forty acres and the location thereof, by virtue of said certificate No. 150, to William McRee, his heirs and assigns, in consideration of five hundred dollars to him paid by said McRee, and made to said McRee a title bond, by which he, said Clay, obliged himself to convey said lands and location to said McRee on payment of said purchase-money; that said William McRee entered into the possession of said lands and paid for the same, and was seized and possessed of said lands at his death, on or about the year 1834; that after the death of said William McRee, to wit,
18 on the 11th day of October, 1839, said Henry Clay and wife by deed of that date, reciting the payment by William McRee in his life-time of said five hundred dollars purchase-money, bargained, sold, and conveyed to the only heirs and legal representatives of said William McRee, then deceased, to wit, Ann McRee, James F. McRee, and Samuel McRee, all that said six hundred and forty tract of land, located by virtue of New Madrid certificate No. 150, issued to James Y. O'Carrol, or his legal representatives, being the same tract of land acquired by said Clay at said sheriff's sale against Joseph Hertzog; and in said deed he, said Clay, covenanted to warrant and defend the title to said tract of land against all persons claiming under him. The last-named original deed not being in the power of the plaintiffs, they file herewith a copy thereof, marked
19 "Exhibit No. 14." The last-named deed was duly acknowledged October, 11, 1839, and duly recorded in St. Louis County, Mo., June 2nd, 1840.

That on the execution of said last-mentioned deed, said title bond, held by said William McRee, was destroyed, as these plaintiffs suppose. They

have never had it or known of its existence since said deed to the heirs of William McRee.

That on July 4th, 1836, said Ann McRee, James F. McRee, and Mary McRee, his wife, by their deed of that date, in consideration of sixteen hundred dollars ($1,600) to them paid by Samuel McRee, granted, bargained, sold, aliened, enfeoffed, and conveyed to said Samuel McRee, his heirs, and assigns, all real estate of which said William McRee died seized and possessed, and more particularly a certain tract of land situate, lying, and being near the town of St. Louis, bordering on the commons of said town, in the State of Missouri, said to contain seven hundred
20 arpents, more or less; and said grantors, in said deed to Samuel McRee, did warrant and defend said premises against all claims of any person claiming title to same through or under them, which tract last named was the said Carroll tract.

The original of said last-named deed not being in the power of plaintiffs, they file a copy herewith, marked "Exhibit No. 15." The same was duly acknowledged July 12th, 1836, and duly recorded in St. Louis County, Mo., November 29th, 1836.

That on the 31st day of October, 1839, said Samuel McRee and wife delivered to Pierre Chouteau, jr., the father of these plaintiffs, a deed, whereby, in consideration of one hundred and fifty dollars paid by said Pierre to them, they bargained, sold, released, quitclaimed, and conveyed to him, said Pierre and his heirs, the following-described tract of
21 land situate, lying, and being in the said county of St. Louis, Mo.:

"Beginning on the eastern line of the league square granted and confirmed to Charles Gratiot, at a point where the southern line of land confirmed to Susan Dubruiel intersects said line of the league square, thence with the line of said league square south 8 deg. 40 min. west 48 chains, to a point in said line corner of Susan Jannett's claim; thence south 83 deg. 30 min. east 13 chains 64 links, to a post; thence north 8 deg. 40 min. east 45 chains 97 links, to a post; thence north 75 deg. west 13 chains 70 links, to the beginning," containing the quantity of 64 acres, being part of the tract located under a New Madrid certificate issued to James Y. O'Carrol, or his legal representatives, to be taken off the western end of said tract, and the said deed declared that the sixty-four acres it conveyed was the same parcel of land conveyed to said Pierre Chouteau, jr., by Robert Wash as trustee of Joseph Hertzog,
22 by deed recorded in recorder's office of St. Louis County, Mo., in book M, page 172, &c., to have and to hold said tract of land to said Pierre, jr., and his heirs forever. The original of said last-named deed not being in the power of the plaintiffs, they file herewith a copy thereof marked "Exhibit No. 16." The said last-named deed was duly acknowledged October 31st, 1839, and was duly recorded in St. Louis County, Mo., on November 8th, 1839.

That on the 4th day of September, 1821, the said Joseph Hertzog filed his bill in chancery in the office of the clerk of the circuit court of St. Louis County, Mo., setting forth the following facts, to wit: That he, said Hertzog, at the time of filing said bill, was a resident of the town and county of St. Louis; in June, 1811, he was residing in Philadelphia, Pa., and agreed with his
23 nephew said Christian Wilt, whom he had raised in his store, but who was then residing in St. Louis, to form a partnership with him in the

trade and business of selling merchandise in the then Territory of Louisiana, and in whatever other business they should choose to engage in, the terms of said partnership being these: said Hertzog to furnish all the capital, purchase the goods at Philadelphia and elsewhere at the East, attend to transportation of same, and in general do all things necessary and proper for a partner residing at the East; said Christian to reside at St. Louis and superintend all the business of the concern at St. Louis, and elsewhere in said Territory, for which he was to receive one-third of the profits and suffer one-third of the losses; that in pursuance of this understanding and agreement said Hertzog consented that the name and style of said concern should be "Christian Wilt," and in that name and firm said Joseph Hertzog and Christian Wilt commenced business
24 in St. Louis, and elsewhere in Missouri, and continued so until the fall of 1818, when they agreed to take into their firm at St. Louis Andrew Wilt, the brother of said Christian; that during the said partnership known as "Christian Wilt," he, said Christian, with the goods and partnership funds of said concern, purchased a considerable real estate for and on account of said firm, as the books thereof showed, the title-deeds whereof were taken in the name of "Christian Wilt;" that among other pieces of real estate he purchased said six hundred and forty acres of land, it being a certain location made by said Christian Wilt, by virtue of a certain New Madrid certificate, No. 150, dated November 30th, 1815, in the name of James Y. O'Carrol, or his legal representatives, as would appear by reference to the records of the office of the surveyor-general and the deed of said Tanner; that said partnership
25 of Christian Wilt continued until the fall of 1818, when said Hertzog agreed to advance for said Andrew his share of the capital stock, to wit, one-third, and said Hertzog and Christian Wilt agreed that said Andrew should be taken in as an equal third partner in said firm at St. Louis, and that the whole effects, credits, goods, and stock in trade of said firm of Christian Wilt should form the stock of the new firm, to be styled C. & A. Wilt & Co.; that said last-named firm continued until the death of said Andrew Wilt and Christian Wilt in the summer of 1819. During said last-named firm the same made no profits, but lost much, and all the capital stock of said Andrew in the firm of C. & A. Wilt & Co. was advanced by said Hertzog; that said Christian Wilt died intestate, leaving as his next of kin and only heir and legal representative his infant son, George Wilson Wilt, then about
26 four years old; the wife of said Christian died four years before; that Charles S. Hempstead, then of the town of St. Louis, administered on the estate of said Christian Wilt, and also was appointed guardian to said George Wilson Wilt, who was then residing with said Hempstead.

And the said Joseph Hertzog, in his said bill, prayed that said Charles S. Hempstead, administrator of said Christian Wilt and guardian of said George Wilson Wilt, should answer the same, and that the court would decree that said Hempstead should transfer and convey to said Hertzog, as surviving partner of said Christian Wilt, all said tract of lands so located by certificate No. 150. *The* the said Charles S. Hempstead, defendant, he being administrator of Christian Wilt and guardian of said
27 George Wilson Wilt, answered said bill, and such proceedings were

had in said cause; that at the August term of said court, 1821, a decree was made that said Hempstead, as such guardian, should convey said lands so located to said Hertzog as surviving partner. A transcript of the record in said cause last-named is filed herewith, marked "Exhibit No. 17."

These plaintiffs say that the statements of said Hertzog in his said bill were and are true, and each of said statements was and is true as stated, and neither said Christian Wilt, nor Andrew Wilt, at his death owned any beneficial interest either in the firm of Christian Wilt or C. & A. Wilt & Co., but said Hertzog owned the whole effects and assets of said firms, and of each of them. That on 10th September, 1821, said Hempstead, as guardian of George W. Wilt, made a deed to Joseph Hertzog, surviving partner, reciting said decree of the court, and conveying to him
28 as such surviving partner said six hundred and forty acres, located by said certificate No. 150, to have and to hold to him and his heirs and assigns. The original not being in the power of the plaintiffs, they file a copy thereof, marked "Exhibit No. 18."

The same was duly acknowledged September 13, 1821, and duly recorded in St. Louis County, Mo., the same day. That before the execution of said conveyance by said Henry Clay to the heirs of said William McRee, to wit, October 20th, 1829, said Clay filed his bill in chancery, in the office of the clerk of the St. Louis circuit court, in which he, said Clay, set forth and averred the following facts, to wit, that he, said Clay, was executor of James Morrison, deceased; that said Christian Wilt, then residing in the town of St. Louis, died in the summer of 1819, seized in fee and possessed among other real property of the following, to
29 wit, a tract in the prairie called the Barrier Des Noyer, containing six hundred and forty acres, more or less, it being a location by virtue of New Madrid certificate No. 150, dated November 30th, 1815, in the name of James Y. O'Carroll; that in his life-time, and at his death, said Wilt was the partner of one Joseph Hertzog, who supplied said partnership with all its capital; that said partnership was carried on in the name of Christian Wilt; that said business met with heavy losses, and at said Christian's death it owed heavy debts; that said tract of land, in the name of O'Carrol, was partnership property, acquired by said Christian on partnership account and with said partnership funds, and on said Christian's death creditors of said firm called on said Hertzog for payment, and it became necessary, in closing the business of said firm, that the title to said land be vested in fee in said Joseph to enable him
30 to secure and pay the debts of said partnership; that said Christian at his death left one child, George W. Wilt, a minor about four years old, his only heir, and of whom Charles Hempstead was guardian; that said Joseph Hertzog, in order to vest in himself the legal title to said land and other real property in like condition, filed his bill in the St. Louis circuit court of chancery, in the year 1821, and such proceedings were therein had that, September 6th, 1821, said court rendered a decree in favor of said Joseph Hertzog, that he was entitled to have the legal title thereto vested in him, and said Hempstead, as such guardian, should convey said land to said Joseph Hertzog as surviving partner of said firm of Christian Wilt; that said Hempstead, guardian as aforesaid, made a conveyance of said land in fee to said Hertzog.

That afterwards, by sheriff's deed, dated May 17th, 1825, upon

31 judgment and execution against said Hertzog, and sale thereunder, all the right, title, and interest of said Hertzog in said six hundred and forty acre tract was conveyed in fee to said Clay, and he, said Clay, supposed he had a good title to said land; but he had been informed and believed, and charged in his said bill, that said decree in favor of said Hertzog, from some defect, was inoperative, and that said Hertzog, though owning and possessing the equitable title to said land, did not obtain by said decree and deed of Hempstead the legal title, so that said Clay, standing in said Hertzog's stead, was the owner of said lands in equity, and entitled to a decree of the legal title; and that said George W. Wilt died in April, 1823, leaving as his heirs Abram Wilt, Catherine Wilt, married to said Joseph Hertzog; Elizabeth Wilt, married to Michael Baker; Ann Wilt, married to George Ritter; Rachael Hempstead, wife of Charles S. Hempstead; that said Rachael since died, leaving her only heirs, 32 Edward Hempstead, and infant, and Charles S. Hempstead, jr., Charles S. Hempstead being guardian of said Edward and Charles S., jr.; that in August, 1827, Joseph Hertzog died, leaving as his only heirs Mary Hertzog, married to John Dougherty; Elizabeth Hertzog, married to William Collins; Rachael Hertzog, an infant; Anne Hertzog, an infant; that all said heirs of Wilt and Hertzog resided beyond the limits of the State of Missouri; that said Joseph Hertzog and wife, in their life-time, made some deed of trust, mortgage, or incumbrance upon said six hundred and forty acres to Robert Nash, to secure some claim to Louis Devotion, which has been or will be paid without binding said lands; and said bill proceeded to make said Nash, and all said heirs of Wilt and Hertzog, and all the husbands of said heirs, parties to 33 said bill, and such proceedings were had that all said persons were brought before the court, and, according to the prayer of said bill, the decree of said court was duly made May 10th, 1832, taking said bill for confessed, and passing all the right, title, and interest of said defendants to said Clay and his heirs, as will appear, among other things, in the record of said suit filed herewith, and marked "Exhibit No. 19."

The *defendants* [plaintiffs*] further state that on 23rd day of March, 1844, said Samuel McRee filed his bill in chancery in the office of the clerk of the circuit court of St. Louis County, Missouri, the scope and object of said bill being to have vested in him the legal title to said six hundred and forty acres of land, located by New Madrid certificate No. 150; and in his said bill the said Samuel McRee, in order to obtain a decree in his favor, set forth, recited, and relied upon all the matters and things 34 averred in the aforementioned bill of Joseph Hertzog as true, and set forth the said decree obtained by said Hertzog and said conveyance by Hempstead, as guardian of said George Wilson Wilt, to said Hertzog, as surviving partner; further, said Samuel McRee set forth, recited, and averred in his said bill all the facts as heretofore stated by these plaintiffs in this petition as to the debt due by said Hertzog as such surviving partner to Henry Clay, executor of James Morrison, the judgment obtained therefor by said Clay, the issuing of execution thereon, the said levy and sale to Clay, and conveyance by the sheriff to him, said Clay, the conveyance by said Clay to Ann McRee, James F. McRee, and Samuel McRee, and the conveyance aforesaid by said Ann McRee, James F.

* In pencil in original.

McRee, and Mary McRee to him, said Samuel McRee; and he, said Samuel McRee, further stated that by means of said facts he was
35 possessed of an equitable title to the said O'Carroll tract of six hundred and forty acres and the location thereof under certificate No. 150 aforesaid.

That said George Wilson Wilt died in April, 1823; that his heirs were Edward Hempstead, Charles S. Hempstead, Catherine Hertzog, Elizabeth Baker (wife of Michael Baker), and Ann Ritter (wife of George Ritter).

That Joseph Hertzog died in August, 1827, leaving as his heirs Mary Dougherty (wife of John Dougherty), Elizabeth Collins, Ann Wickliffe (wife of Wm. N. Wickliffe), Rachael Cook (wife of Philip St. George Cook), all of whom and said husbands were made defendants to said bill of Samuel McRee and regularly brought before the court, and such proceedings were had therein that all the right, title, and interest of said defendants in and to said six hundred and forty acres of land, located by said certificate No. 150, was passed to and vested in said Samuel
36 McRee and his heirs in fee-simple. A transcript of said record of said last-mentioned suit is filed herewith, marked "Exhibit No. 20."

These plaintiffs state that Pierre Chouteau, jr., their ancestor, immediately after the conveyance to him by Robert Wash, on the 27th day of November, 1824, of said sixty-four acres of land, entered into the possession thereof, and continued in said possession till his death, in the year 1865, and that these plaintiffs immediately succeeded their said father in the possession of said premises, and have held it ever since, as devisees under his will, until about the 6th day of May, 1872, when the defendant, Gibson, claiming to have procured the legal title to said sixty-four acres, entered upon a portion thereof, and has since held the same against plaintiffs, as will be hereinafter shown. A copy of said will of said Pierre Chouteau will be filed herewith as Exhibit 21.

37 These plaintiffs further state that the conveyance of said Samuel McRee to Pierre Chouteau, jr., whereby he, said Samuel, "bargained, sold, quitclaimed, released, and conveyed to said Pierre, to have and to hold to him and his heirs forever, the said sixty-four acres of land, the same being part of the tract located under a New Madrid certificate issued to James Y. O'Carroll, or his legal representatives, to be taken off the western end of said tract, and being the same parcel of land conveyed to said Pierre Chouteau by Robert Wash, trustee of Joseph Hertzog," operated as an equitable assignment to said Pierre, and to his heirs, of so much of said certificate No. 150 as covered the said sixty-four acres of land so sold by said Samuel McRee. They are advised that in good conscience and equity neither said Samuel McRee nor any one claiming under him can be permitted to claim title to such part of said warrant or to said land.

38 That whether a title had been legally perfected or not to the land in question, said conveyance to said Pierre Chouteau would and did pass to him and his heirs the interest in said certificate corresponding to said sixty-four acres; and ever after said conveyance to his death, said Pierre Chouteau was the equitable owner of said certificate No. 150, to said extent of sixty-four acres, and of the land described in said deed to him from said McRee. And these plaintiffs further say that the

statement on the face of said conveyance to said Pierre, that the said lands had been located under said certificate whether effective to vest a legal title or not, was and is an equitable agreement, binding on the conscience of said Samuel McRee, and all claiming under him, that the land described therein should be located (if not already located) by said cer-
39 tificate for the use and benefit of said Pierre, his heirs and assigns; and that from the delivery of said deed of said Samuel McRee he held (said designated tract of sixty-four acres of said certificate No. 150) in trust for that purpose for the use of said Pierre, his heirs and assigns.

And the plaintiffs say further that said Samuel McRee and all claiming under him, are equitably estopped from denying that said sixty-four acres had been properly located by said certificate 150, at the date of said deed to said Pierre from said Samuel.

These *defendants* [plaintiffs*] are advised that good conscience and equity forbade that said Samuel should sell to said Pierre so much land as located by the certificate, and receive from said Pierre the value thereof in money, without raising in said Pierre, his heirs, and assigns, some use in the certificate, and fixing upon said Samuel, his heirs and assigns, some trust which would equitably prevent and estop him and them from afterwards
40 nullifying said location, or appropriating it to his or their own benefit, or using said certificate for the purpose of securing title to the land for themselves; and plaintiffs say that said Samuel, and all claiming under him, are estopped from denying the rights of said Pierre Chouteau to 64 acres, parts of said 640 acres of land.

These plaintiffs say that when the said James Tanner made the aforesaid conveyance to Christian Wilt, authorizing him, said Wilt, his heirs and assigns, to locate said certificate, and conveying the land to be located by the same wherever it might be fixed, and after a perfect location should be made, binding him, said Tanner, his heirs and assigns, to make a new deed of warranty to said Wilt, his heirs and assigns for such located land, according to the final survey thereof, he, said Tanner, fixed upon
41 all persons claiming under said Tanner the duty of making such a conveyance of the land finally located to any assignee of said location, and a use was secured thereby in said Chouteau, as assignee of said location.

In fact these plaintiffs say that said Samuel McRee always understood, after making said deed to said Pierre Chouteau, that he, said Chouteau, was the owner of said sixty-four acres of said certificate, and the owner of the sixty-four acres of land named in his deed.

That said Samuel resided near said land while said Pierre was occupying and cultivating it; always spoke of it as the property of said Pierre, and never claimed any interest in it.

When said Samuel McRee commenced said suit against the heirs of Wilt and Hertzog he did so with intent to perfect the title, as well of said Pierre Chouteau as of himself; so represented to said Pierre, and
42 when he had procured the said decree therein again represented to said Pierre that his, said Pierre's, title was made perfect thereby. That on the 16th day of October, 1845, while said suit of Samuel McRee was pending he, said Samuel, made a deed to James H. Lucas and Ann L. Hunt, wherein he referred to said sixty-four acres as the property of said

* In pencil in original.

Pierre Chouteau, conveyed to him by said Samuel, and called for the tract so conveyed by him to said Chouteau as the boundary of the tract thereby conveyed; copy of said deed is filed as Exhibit 22, original not in power of plaintiff.

These plaintiffs state that the said Pierre Chouteau occupied, cultivated, and improved the said sixty-four acres, and paid the taxes charged thereon at all times while said William McRee and his heirs, and said Samuel McRee claimed an interest in said six hundred and forty acres or the
43 location thereof under said certificate No. 150, not only without objection by said William, or his heirs, or by said Samuel McRee, but with the knowledge, consent, and approbation of said William and his heirs and said Samuel.

That after said Samuel's death, his widow, Mary McRee, recognized the right of said Pierre Chouteau to said sixty-four acres, just as said William McRee and his heirs and said Samuel McRee had done.

That, in fact, said Pierre Chouteau paid the taxes assessed upon the sixty-four acres from the year 1824, when he purchased it from Wash, until the plaintiff, Charles Gibson, took possession of a part thereof as will be hereinafter mentioned, and that neither said William McRee, nor any one of his heirs, nor Samuel McRee, nor his widow, Mary, ever paid any taxes on said sixty-four acres during all the time last mentioned; on the contrary, they assessed their own adjoining lands and paid taxes for
44 the same as bounded on the west by the said sixty-four acres of said Pierre Chouteau.

That said Samuel McRee died about the year 1849, leaving a will, by which he devised to his widow, Mary McRee, all his real and personal estate, in general terms.

A copy of said will is filed herewith, marked "Exhibit 23." That said sixty-four acres was no part of said estate of said Samuel.

These plaintiffs are advised that the conduct of said William McRee and his heirs, and Samuel McRee and his widow, during so many years, is conclusive as admission on their part of the beneficial ownership and equitable use and right of said Pierre Chouteau and his heirs in said sixty-four acres of land, and that said Samuel McRee was bound by a trust imposed upon himself and in favor of said Pierre Chouteau, which restrained him
45 from claiming a right to said sixty-four acres as long as he lived, and all claiming under him after his death.

These plaintiffs are advised and aver that the bill of said Samuel McRee shows that Joseph Hertzog was the surviving partner of the firm of Christian Wilt, also of the firm of C. & A. Wilt; that as such he, said Hertzog, was the owner of all the assets of said firms; that the equitable use and title thereto was in him, and that his deed to Wash, and Wash's deed aforesaid to Pierre Chouteau passed to said Chouteau an equitable title to said sixty-four acres of land, and operated as an equitable assignment to so much of said certificate No. 150 as would support said location, and that it was impossible for said Hertzog to convey to Wash, or Wash convey to Chouteau, said sixty-four acres of land so located by said certificate No. 150, without at the same time passing an equitable claim
46 to sixty-four acres of said certificate; that no one can be allowed to take advantage of his own wrong, or to insist that his solemn act, made for a valuable consideration paid to him, has no legal or equitable effect.

The plaintiffs say that after the said Pierre Chouteau, jr., their ancestor, had possessed and enjoyed said sixty-four acres of land, without interruption or claim, or the least intimation of such a thing from the Wilts or Hertzog, or Wash, or William McRee or his heirs, or Samuel McRee or his widow, Mary McRee, from November 30, 1824, to about the year 1860, a period of more than thirty-five years, the said Charles Gibson, the defendant in this suit, and the said Mary McRee, the widow of the said Samuel McRee, conspired together to cheat and defraud the said Pierre Chouteau and his heirs out of all right and title to said sixty-four acres of land.

That up to the 10th day of June, 1862, no patent had been issued
47 upon said survey 2498 located under said certificate No. 150, to O'Carrol or his representatives; and the plan adopted by said Gibson and said Mary McRee so to obtain said sixty-four acres of land, worth not less than one hundred thousand dollars, was to manipulate and control officials in the Land Office Department so as to have a patent issue directly to Mary McRee for the whole six hundred and forty acres, a part of which had been previously vested equitably in said Pierre Chouteau; which being done, the said Mary McRee was to convey the said sixty-four acres to said Gibson, in consideration that he had been her selected counsel and agent and attorney, and had manifested great zeal in her cause.

Another part of said plan agreed upon between the said Mary McRee and said Gibson was to pretend that when said Samuel McRee conveyed to said Pierre Chouteau he had no title to the certificate No. 150
48 or in the location thereof, and to procure some pretended outstanding rights thereto in order to furnish a color of justice to the proceeding; whereas the plaintiff' say that long before the death of Samuel McRee the rights of Christian Wilt and Andrew Wilt and Joseph Hertzog, and their heirs and representatives, who were the only owners and claimants of the location under certificate No. 150, and of said certificate itself, had been vested in said Samuel, and the said sixty-four acres in said location and in said certificate had been assigned by said Samuel to said Pierre, and was not passed by said Samuel's will to said Mary McRee.

These plaintiffs are informed and believe that said Gibson and said Mary McRee, in furtherance of said conspiracy between him and Mary McRee, may have procured from certain persons some conveyances;
49 but if so said persons had no right to convey, and their deeds passed no title whatever to said Gibson or said Mary McRee.

Nevertheless said Gibson affected to own the whole six hundred and forty acres located under certificate No. 150 and conveyed to Mary McRee for a consideration of ten dollars said whole six hundred and forty acres, saving and excepting the sixty-four acres belonging to said Pierre Chouteau, which ten dollars was much more than the value of his, said Gibson's, pretended title.

In consideration of this last-mentioned conveyance by said Gibson of land which he did not own, the said Mary McRee agreed with said Gibson that she would convey to him the sixty-four acres belonging to said Pierre Chouteau as soon as he (Gibson) would procure direct to her a patent for the whole tract, including Chouteau's sixty-four acres, which
50 he, said Gibson, faithfully promised her he would accomplish as her agent and attorney. The plaintiffs say that after making said last-

named promise to said Mary McRee he, said Gibson, appeared before the surveyor-general and represented to him untruly that Mary McRee was the only rightful owner of said location under certificate No. 150, and only rightful owner of said certificate No. 150, and, as attorney and agent of said Mary McRee, requested said surveyor-general to set aside the old survey of said location by Brown in April, 1818, and make a new one; which request was granted to the said Mary McRee upon the supposition that she was the only party interested in said certificate and location.

But it was not true, as represented by said Gibson, for Pierre Chouteau was assignee of sixty-four acres of said certificate, as he, said Gib-
51 son, well knew. The purpose of said Gibson and Mary McRee in procuring a new survey was to have a survey of a date posterior to that of the conveyance by Samuel McRee to said Pierre, which in their opinion would defeat all his (Chouteau's) equitable claims.

And said plaintiffs say that the said Charles Gibson and Mary McRee, affecting and pretending to make a new and different location of the said New Madrid certificate No. 150, and to rescind and set aside the location thereof already made—that is to say, in 1818, by Joseph C. Brown—within which last-named location lay the said tract of sixty-four acres, conveyed as aforesaid by Samuel McRee and Mary McRee to Pierre Chouteau, jr., did approach the United States recorder of land titles at St. Louis, on the 26th March, 1862, and did procure from him issue of another patent certificate, No. 494, to James Y. O'Carrol, or his
52 legal representatives, on the said survey of the location thereof made by said Joseph C. Brown, said patent certificate differing from the patent certificate No. 447 only in the notice therein taken of the interference of the survey made by Joseph C. Brown, with the other survey and claim, but adopting the said survey and covering the same land ascertained thereby as made by Brown, and none other. And afterwards the said Charles Gibson, acting for himself and for Mary McRee, on the 10th June, 1862, did untruly represent to the Commissioner of the General Land Office and to the President of the United States, that all the right of the said James Y. O'Carrol, to the New Madrid certificate and patent certificate had come to and was vested in Mary McRee by mesne conveyance, and did procure from them the issue to the said Mary McRee, on that day, of a patent for the identical land whereof the
53 said Joseph C. Brown had made a location under said New Madrid certificate No. 150, in 1818, a copy of which patent certificate No. 494, and of the patent thereon issued, dated 10th June, 1862—the original not being in the possession or control of plaintiffs—is herewith filed, marked "Exhibits 24 and 25."

And the said Gibson at the time of making to the Land Commissioner of the General Land Office and the President of the United States the representation that the said Mary McRee was the owner and holder of all the right, title, and interest of James Y. O'Carrol in and to the said certificate and location by mesne conveyance, well knew that the said Pierre Chouteau was the owner and holder in his own right of a portion of said location, to wit, the said tract of sixty-four acres thereof; and that he, the said Pierre Chouteau, held the same precisely as the said Mary McRee held the rest and residue of said location; that is to say, through
54 and under the said Samuel McRee; and that the general and un-

qualified statement that the said Mary McRee was the assignee of the said James Y. O'Carrol in respect of the said location and the land embraced within the same in the said patent contained to the said Commissioner of the General Land Office and the President of the United States, suggested and insinuated by the said Gibson, was untrue and intended by said Charles Gibson to deceive said officer and to defraud and injure the said Pierre Chouteau, ancestor of these plaintiffs; and afterwards, to wit, in December, 1862, the said Charles Gibson and Mary McRee, in further prosecution of their design to defraud the said Pierre Chouteau of his land to him sold and conveyed as aforesaid, did for the first time procure from the United States recorder of land titles at St. Louis an order setting forth that the said patent certificate No. 447, issued 16th
55 August, 1841, be annulled and set aside and declared of no effect; which order was unauthorized, illegal, and beyond the power of the said recorder, and was procured by the said Charles Gibson for the illegal and fraudulent purpose of defeating the conveyance made to the said Pierre Chouteau by Samuel McRee and Mary McRee as aforesaid; and afterwards, to wit, on the 9th of January, 1863, the said Charles Gibson, in order further to give color and a show of consistency to his said fraudulent designs, and in pursuance of them, did produce to the Commissioner of the General Land Office the said order issued December, 1862, by the recorder of land titles, and procured from said Commissioner on that day a letter to the said United States recorder of land titles at St. Louis, approving of his said action setting aside the said patent certificate No. 447, and issuing another, to wit, patent certificate No. 494 for
56 the self-same land in lieu thereof; and on the 2nd day of March, 1863, the said Charles Gibson, in further pursuance of said fraudulent design, did procure from the Secretary of the Interior a letter to the Commissioner of the General Land Office, affirming and approving the said substitution of patent certificate No. 494 in lieu of patent certificate No. 447, the said Secretary of the Interior and the said Commissioner of the General Land Office being wholly ignorant of the real objects and designs of the said Charles Gibson in procuring said substitution, and supposing the same to be dictated by a desire on the part of said Gibson to have the title-papers in the matter of the said New Madrid location and patent scrupulously correct; whereas the truth and the fact were that the purpose and design of the said Charles Gibson in procuring said substitution were to defeat by a technical objection the meritorious title of
57 the said Pierre Chouteau to the said tract of sixty-four acres conveyed to him, as aforesaid, by the said Samuel McRee, and fortified by a possession of more than twenty-five years.

The plaintiffs say that said patent was procured and issued by fraud, covin, and misrepresentation on the part of Mary McRee and Gibson in order to defeat the right of said Pierre Chouteau to said sixty-four acres of land, and that any legal title to said sixty-four acres so procured by said Mary McRee was taken and held by her in trust for and to the use of said Pierre Chouteau; that neither said Mary McRee or said Gibson ever procured any other title to said certificate No. 150, or the land located thereby, than what Samuel McRee had at his decease; that not one farthing was ever paid by said Gibson or Mary McRee for any new or additional

interest in said land, location, or certificate after said Samuel's death; that all statements, or pretences, to the contrary were and are false
58 and fraudulent; that the said patent issued to Mary McRee, so far as said sixty-four acres are concerned, was based alone on said certificate No. 150, part of which was sold by Samuel McRee to said Pierre; that in so far as said patent represents said sixty-four acres, it was issued in consideration of so much of said certificate and location assigned to said Pierre by said Samuel McRee and others, and owned by him, said Pierre, at the date of said patent; that so much of said patent was purchased with the money and certificate of said Pierre; that after the sale of the location and certificate to said Pierre by said Samuel, he and all claiming under him were equitably estopped from disturbing the same, or withdrawing the location existing at the date of the said sale to said Pierre, or making any other to defraud said Pierre and benefit themselves; that neither
59 said Mary McRee or said Gibson had any more meritorious claim to said sixty-four acres than their causing the withdrawing of the survey of April, 1818, and the procuring a new survey and patent certificate, as above mentioned, could give them, and the only consideration which they surrendered to the United States for the patent upon said sixty-four acres was that portion of the said certificate which was owned by said P. Chouteau.

The plaintiff further allege that the Land Department and the officers thereof committed gross error and violation of law and fraud upon plaintiffs is issuing said patent direct to Mary McRee, and in inserting in said patent the false statements aforesaid.

These plaintiffs further say they are advised that inasmuch as the right which the said Samuel McRee had in said location and certificate in 1838 and 1839, and the right which said Christain Wilt had in said lo-
60 cation and certificate in 1819 was inchoate and in process of maturing into a perfect right, and was contingent as depending on future events; the same was the proper subject of disposition as an expectancy and possibility, and that every conveyance thereof made by any of said parties was operative as an equitable agreement to vest the land in such assignee of said location when perfected, and each and all are equitably estopped to assert the contrary or defeat the consummation of such perfect right by any preventive act.

That on the 8th day of August, 1862, said Mary McRee, in pursuance of her agreement with said Gibson, conveyed to him by quit-claim deed, in consideration that he had been her selected counsellor, agent, and attorney, and, "as an evidence of her appreciation of the zeal and fidelity he had manifested in her cause," the whole sixty-four acres of land above mentioned, belonging to said Pierre Chouteau.

61 The original not being in the power of the defendants, a copy thereof is filed herewith, marked "Exhibit No. 26." The same was duly acknowledged September 2, 1862, and duly recorded September 15, 1862.

The plaintiffs further state that after their father Pierre Chouteau, jun., and plaintiffs claiming under him, had occupied, improved, cultivated, and possessed said sixty-four acres of land adversely to all the world continuously for more than forty-five years without interruption, the defendant Gibson, on May 6th, A. D. 1872, wrongfully entered upon the southern

portion of said sixty-four acres a tract to the extent of some 40 acres, more or less, claiming under said fraudulent patent to Mary McRee and said Mary's deed to Gibson, and has since held the same adversely to plaintiffs, and taken to himself the rents and profits thereof of great value, to wit, ten thousand dollars per annum.

That said Gibson gives it out in speeches that he owns the legal
62 title to said tract of 64 acres by means of said fraudulent patent and deed to him, and has commenced an action of ejectment against the plaintiffs in this suit to recover the northern portion of said 64 acres, now in possession of plaintiffs, relying on said fraudulent patent and deed of Mary McRee to maintain the same; that said patent and deed to Gibson is a cloud upon the plaintiff's title.

In tender consideration whereof, the plaintiffs pray that said Gibson be declared a trustee of plaintiffs as to any right held by him under said patent in said sixty-four acres; that he shall surrender the same to the plaintiffs; that he account for the rents and profits; that he surrender possession to plaintiffs; and that the plaintiffs have general relief in the premises.

T. T. GANTT, GLOVER AND SHEPLEY,
For Plaintiffs.

63 Whereupon a summons issued, directed to the sheriff of St. Louis County, and by him returned duly executed on the 20th day of October, 1873.

And on the 22nd day of April defendant filed his answer to said petition, in words and figures following, to wit:

Answer.

In circuit court, Missouri, St. Louis County.

CHARLES GIBSON
ads.
CHARLES P. CHOUTEAU ET AL. } No. 4. Reply by plaintiffs.

Defendant, reserving the right to except to the errors, generalities, omisions, and imperfections contained in the alleged equitable claim of plaintiffs, says:

1. That he denies that the premises in dispute or any part thereof are embraced within the limits of any claim of James Y. O'Carroll, or were conveyed by Samuel McRee and wife to Pierre Chouteau, jr., or that any New Madrid certificate was issued to O'Carroll, or his legal repre-
64 sentatives, conveying any authority to him or them to make any location, as alleged, or that O'Carroll conveyed the 640 acres of land, situated in New Madrid County, Missouri, which had been injured by earthquakes, and in lieu of which any New Madrid certificate was issued to George Ruddle, or made any covenant with him, as alleged, or that said Ruddle conveyed to Tanner and Gillespie any undivided interest, or any interest whatever therein, or any right to exchange the same with the United States for other lands; or that the deed contained the recitals as averred, or that said Gillespie, in 1816, conveyed his interest therein to Tanner, as

alleged, or that said Ruddle, on the 16th May, 1818, or at any time, conveyed any interest, or any undivided interest, in said premises to Andrew P. Gillespie, as charged, or that said Gillespie conveyed the same to James Tanner, as charged, or that said Tanner conveyed the same, or any
65 part thereof, to Christian Wilt, or made the recitals or covenants in his deed, as charged, or that Wilt gave notice of the location of said claim under said certificate, either on the 8th November, 1816, or the 16th June, 1818, or ever, as charged; or that said Brown made any certificate as to interference with the cul-de-sac fields, as charged, or that any survey was made in 1818, or that Hertzog in 1822, or at any time, conveyed the premises or any portion thereof, or any interest therein, to Robert Wash, in trust, or for any purpose, as stated, or that said Wash, in 1824, or at any time conveyed the same, or any part thereof, or any interest therein to Pierre Chouteau, jr., as charged, or that said Chouteau ever paid said Wash or Hertzog anything whatever for the same, or that said certificate was located as charged, or that said Hertzog was then a resident of St. Louis, or that Henry Clay was executor of James Morrison, or recovered a judgment against said Hertzog for any sum, or issued any execution thereon,
66 or that the same was levied upon said tract of 640 acres, or advertised, sold, or conveyed to Clay, by the sheriff, as charged, or that said Clay, executor, after any purchase, contracted to sell any portion of said premises, or any interest therein, or the location thereof, by virtue of said certificate No. 150, to William MacRee, for any consideration, or ever made to said William MacRee any title bond by which he obliged himself to convey to said William MacRee said premises or location, or any part thereof, or any interest therein, or that said William MacRee entered into possession of said lands and paid for the same, or was seized and possessed of said lands at his death, in 1834, or that after his death, either on the 11th day of October, 1839, or at any time, Henry Clay and wife, by deed, reciting the payment by William MacRee, in his life-time, of five hundred dollars, bargained, sold, and conveyed to the only heirs of said Will-
67 iam all that 640 acres of land located by virtue of New Madrid certificate No. 150 issued to James Y. O'Carroll, or his legal representatives, or any tract of land acquired by said Clay at sheriff's sale against said Hertzog, or that said deed contained any warranty, or that any title bond was upon the execution of said deed destroyed, or that any title bond from said Clay to said William MacRee ever existed, or that Ann F. MacRee and James S. MacRee and wife conveyed said tract to Samuel MacRee with warranty, on the 4th day of July, 1836, or at any time, as alleged, or that said Samuel MacRee and wife did, on the 31st of October, 1839, or afterwards, deliver to Pierre Chouteau, jr., any deed whereby, in consideration of one hundred and fifty dollars, paid by said Pierre to them, they bargained, sold, released, quit-claimed and conveyed to him, said Pierre, the land described in the answer or any part thereof, or any interest therein, or that Joseph Hertzog did, on the 4th day of September, 1821, or at any time, file his bill in chancery in the cir-
68 cuit court of St. Louis County, as charged, or that any bill so filed set forth that he was a resident of St. Louis, or that in June, 1811, he was residing in Philadelphia, Pa., and agreed with Christian Wilt to form a partnership with him, or that said Wilt was raised in his store, or that Hertzog was to furnish all the capital of said partnership,

or that said Wilt was to receive one-third of the profits and incur one-third of the losses, or that the style of the firm should be Christian Wilt, or that said Hertzog and Wilt in that name commenced business in St. Louis and elsewhere, and so continued until 1818, and that they took in Andrew Wilt as a partner, or that during said partnership said Christian Wilt, with the goods and partnership funds, purchased the said tract of 640 acres, covered by said New Madrid certificate, and took the title deed in his own name, or that said firm lost much, or that said Chris-
69 tian Wilt died intestate, leaving George Wilson Wilt as his only heir, or that Charles S. Hempstead administered on his estate, or was appointed guardian of said George Wilson Wilt, or that said Hempstead answered said bill, or that at the August term of said court, 1821, a decree was made that said Hempstead, as such guardian, should convey said lands so located to said Hertzog, as surviving partner, of any of the many matters and things alleged to have been in said bill, or that any of the statements in any such bill were or are true, or that said Hertzog ever was partner of either of said Wilts.

Defendant denies that said Hempstead, as such guardian of G. W. Wilt, ever made any deed to said Hertzog, as surviving partner, under said decree, or that there was any deed or decree conveying to him said 640 acres so located, or any part thereof.

Defendant denies that Henry Clay, on the 20th October, 1829,
70 or any time, filed his bill in chancery in said circuit court, in which he set forth, or that such were the facts; that he was the executor of Morrison, or that Christian Wilt died in 1819, seized in fee and possessed of the 640 acres located by virtue of New Madrid certificate No. 150, or that he was partner of said Hertzog, or that Hertzog supplied the firm with all its capital, or that said partnership was carried on in the name of Christian Wilt, or that the partnership met with heavy losses, or that said tract was partnership property, or that any decree was rendered in favor of Hertzog in 1821, or that said premises were ever conveyed to said Hertzog by Hempstead, as guardian, or by the sheriff to said Clay, or that Hertzog or Clay himself was ever entitled in equity to said premises, or that Joseph Hertzog, on the 4th day of September, 1821, or any time, filed any bill in chancery against George Wilson Wilt, then a minor, or Charles Hempstead as his guardian, or that
71 the same contained any of the averments charged in the petition, or the same was ever served on said minor, or that said minor ever became party to the same, or that any decree was made by the court therein that said Hempstead, as such guardian, should convey said lands to said Hertzog, or that said Hempstead did so convey the same; or that any of the averments in said bill were or are true, or that Hertzog owned the whole effects of Christian Wilt or C. and A. Wilt & Co., or that Henry Clay, on the 20th day of October, 1829, or ever, filed in said circuit court his bill in chancery against all or any of the legal representatives of said Christian Wilt or George W. Wilt as charged, or that said bill showed any sale of the certificate No. 150 or of the land located to said Clay, or any right to either or to any relief whatever, or that said bill contained any of the averments alleged, or that said defendants therein were brought before the court, or that any decree
72 of said court was made passing all the right, title, and interest of said defendants to said Clay and his heirs.

Defendants here says that if any such deeds, sales, and decrees were made they were wholly inaffectual and void, and passed nothing to plaintiff's ancestors, and passed, transferred, vested, and established no right, title, or interest in law or in equity in or to said plaintiffs or either of them, or any person or persons, by, through, or under whom defendants or either of them claim.

Defendant has seen the above exhibits mentioned in the petition, but knows nothing of them or their contents, except what the documents themselves show.

Defendant admits that Samuel MacRee, on the 23rd March, 1844, being advised by his old and able counsellors, Hamilton R. Gamble and Edward Bates, that he had no right, title, or claim of any kind to any portion of said 640 acres located under New Madrid certificate No. 150, did
73 file his bill in chancery in said circuit court, the scope and object of said bill being to have vested in him the legal title to said 640 acres so located; but plaintiff denies that said Samuel did set forth, recite, or aver, and rely upon the matters and things averred and set forth in the bill or decree of said Hertzog or the conveyance of said Hempstead, in 1821; nor did he recite or set forth all the facts stated by the plaintiffs as to the debts due by Hertzog to Clay, the judgment, sheriff's sale, and the conveyance by sheriff to Clay, as being true. On the contrary, the bill of said Samuel was founded wholly upon the pretended and utterly void proceedings in chancery by Hertzog in 1821, and equally void sheriff's sale to Clay, and not upon the averments of facts themselves.

Defendant denies that said Samuel, either in his bill in chancery or otherwise, ever admitted any such facts to be true.

74 Defendant admits that, although the bill of said Samuel was demurable because it set forth the averments of the facts as aforesaid, and not the facts themselves, and was an attempt to found a recovery solely upon proceedings that were purely and utterly void, and also for the reason that, assuming all the facts and averments in his and Hertzog's bills to be true, still he showed no right to recover, yet, as all the representatives of Christian Wilt were duly made parties to said suit, and a transcript plat of the survey of said tract had then been returned to the recorder of land titles, the decree rendered by said court in his favor did "pass to and vest in said Samuel MacRee and his heirs in fee-simple all the right, title, and interest of said defendants in that suit (Wilt's representatives) in and to said six hundred and forty acres, located by
75 said certificate No. 150," but no other title or right than such as Christain Wilt and Hertzog had.

Plaintiff denies that the conveyance of Samuel MacRee to Pierre Chouteau, jr., operated as an equitable assignment to said Pierre and to his heirs of so much of said certificate No. 150 as covered the sixty-four acres.

Defendant denies that defendants were advised that in good conscience and equity neither said Samuel MacRee, nor anyone claiming under him, could be permitted to claim title to such part of said warrant, or to said land; and, if so, plaintiff says such advice was erroneous.

Defendant denies that said conveyance would or did pass to said Pierre any interest in said certificate, or that he ever was the equitable owner thereof to any extent, or of any portion of the land located under it, or

that the deed on its face contained any equitable agreement binding
76 on the conscience of said Samuel MacRee, or anyone claiming under him that the lands therein described should be located by said certificate for the use and benefit of said Pierre, his heirs and assigns, or that from the delivery of said deed from said Samuel, he held said designated tract of sixty-four acres of said certificate No. 150 in trust for that purpose for the use of said Pierre, his heirs and assigns, or that said Samuel MacRee and all claiming under him are equitably estopped from denying that said sixty-four acres had been properly located by said certificate No. 150 at the date of said deed to said Pierre from said Samuel, or that plaintiffs were advised that good conscience and equity forbade that said Samuel should sell to said Pierre so much land as located by said certificate and receive from said Pierre the value thereof in money without raising in said Pierre, his heirs and assigns, some use in the cer-
77 tificate and fixing upon said Samuel, his heirs and assigns, some trust which would equitably prevent and estop him and them from afterwards nullifying said location, or appropriating it to his or their benefit, or using said certificate for the purpose of securing title to the lands for themselves, or that such advice, if given, was lawful, right, and proper.

Defendant also denies that said Samuel and all claiming under him are estopped from denying the rights of said Pierre to sixty-four acres, part of said six hundred and forty acres.

Defendant denies that by act or deed of James Tanner fixed upon him, and all persons claiming under him, the duty of making such or any conveyance of the land finally located to any assignee of said location, or that any use was secured thereby in said Chouteau as assignee of said location, or that he was ever the assignee of the location, the certificate or any other part thereof, or any portion of the land.

78 Defendant denies that said Samuel MacRee always or ever understood after making said alleged deed to said Pierre Chouteau, that he, said Chouteau was the owner of any portion of said certificate or land, or that such understanding, if true, would operate to vest any right in said Chouteau which he did not otherwise have.

Defendant denies that said Samuel resided near said land, and avers, on the contrary, he was generally on far distant duty in the regular army.

Defendant denies that said Samuel always spoke of this property as said Pierre's, or never claimed any interest in it, or that when he commenced suit against the heirs of Wilt and Hertzog, he did so with the intent to perfect the title as well of said Pierre Chouteau as of himself, or so represented to said Pierre, or when he had procured said decree he again
79 represented to said Pierre that his said Pierre's title was made perfect thereby.

On the contrary, defendant says that said Samuel would have nothing to do with said Chouteau on account of his making a claim to one-half of the whole six hundred and forty acres, which was utterly baseless, false, and fraudulent and intended by said Pierre to deceive, oppress, and cheat said Samuel.

Defendant further says that said proceedings were instituted and prosecuted by said Samuel for his own benefit, paid for by his own money, although he was then living solely on his salary as an officer of the army; that he was under no obligation in law, morals, or honor to said Chouteau,

that he had no relations with him and was disgusted with him on account of his attempted oppression and fraud, and defendant says that said Chouteau was not party to such proceedings in equity.

Defendant denies that said Samuel on the 16th October, 1845,
80 made a deed to Lucas and Hunt, wherein he referred to said 64 acres as the property of said Chouteau, or called for that tract as a boundary, and plaintiff especially denies that said Chouteau was any party to such deed, or that such calls, if true, would operate to estop said Samuel or his representatives against said Chouteau, or operate to convey any interest, or vest any right whatever, in said Chouteau to the premises in dispute.

Defendant denies that said Pierre occupied, cultivated, or possessed or improved said 64 acres, not only without the objection of said William and Samuel MacRee, but with the knowledge, consent, or approbation of either of them, or that Mrs. Mary MacRee ever recognized his claim thereto or any right in him, or that said MacRee and Gibson assessed their own lands as bounded on the west by said Chouteau, or that Chouteau paid the taxes on said 64 acres from 1824 until the commence-
81 ment of the suit by plaintiff; and plaintiff denies that any of these acts, if true, would vest any right in said Chouteau.

Defendant denies that the plaintiffs are advised, or that it is true in law or fact, that the conduct of said William, Samuel, or Mary MacRee, or defendant is conclusive as admission on their part of the beneficial ownership and equitable use and rights of said Pierre Chouteau and his heirs to said sixty-four acres, or that said Samuel was bound by any trust imposed on him in favor of said Chouteau, which restrained him while living, or any one claiming under him when dead, from claiming said 64 acres, or that the bill of said Samuel MacRee shows that Joseph Hertzog, was surviving partner of any firm of Christian Wilt or C. and A. Wilt, or that Hertzog was the owner of all the assets thereof, or that any equitable use or title was in him, or that his deed to Wash, and Wash's deed to Chouteau passed to said Chouteau any equitable title to said sixty-
82 four acres or operated as an equitable assignment to so much of said certificate No. 150 as would support said location, or that it was impossible for said Hertzog to convey to Wash, or Wash to convey to Chouteau the same, without at the same time passing an equitable claim to sixty-four acres of said certificate, or that such deeds were made.

Defendant denies that defendants or Pierre Chouteau, jr., possessed or enjoyed said sixty-four acres without interruption or claim, or the least intimation of such a thing from Wilts, Hertzog, Wash, William, Samuel, or Mary MacRee, or plaintiff from 1824 to 1860; the plaintiff, on the contrary, says that a suit in ejectment was brought against said Pierre by defendant, and that Mrs. MacRee and defendant claimed said land of him many years prior to and at all times since 1860.

Defendant emphatically denies that he or Mrs. Mary MacRee
83 ever conspired together to cheat or defraud said Pierre Chouteau or his heirs out of any right or title to said sixty-four acres or any part thereof.

Defendant admits that no patent was issued until June 10, 1862, on said location certificate No. 150 and patent certificate No. 494; but he denies that he or Mrs. MacRee adopted any plan to manipulate or control offi-

cials in the Land Office Department, so as to have a patent issued directly to Mrs. Mary MacRee for the whole tract of 640 acres, or that any part thereof had been previously vested equitably in said Pierre Chouteau, or that said Mrs. MacRee was to convey the said sixty-four acres to plaintiff in consideration that he had been selected as her counsel, agent, and attorney in obtaining the patent, and had manifested great zeal and fidelity in her cause in that respect.

Defendant avers that the only consideration Mrs. MacRee ever gave or agreed to give him for acting as her counsel or agent in obtaining
84 the patent was three-fourths of an acre fronting on the old Manchester road, and then worth about $500, and he avers that she gave him the sixty-four acres for defending her against an illegal and immoral suit brought by said Charles P. Chouteau and Julia Maffitt against her for her homestead, in the Prairie des Noyers as hereinafter set forth, and for the further consideration that he would if he recovered, refund her $7,000, being her cost in the said Chouteau and Maffitt case.

Defendant denies that he or Mrs. MacRee adopted any plan to pretend that Chouteau had no right to any part of the location land, or procured pretended outstanding rights thereto in order to furnish a color of justice.

On the contrary, he says when she purchased the outstanding titles she was advised by Geyer, Gamble, and Bates, that Samuel MacRee had never obtained any right or interest in any part of the 640 acres.

85 And both defendant and Mrs. MacRee made no pretence at all, but fairly and fully proved that Chouteau had no right to any part of the land under anybody; that Mrs. MacRee and defendant under her had, independently of any devise from Samuel MacRee, the just and equitable right, if any existed in any person, to said certificate and location, as will be shown particularly hereafter.

Defendant says that neither of the Wilts or Hertzog or Samuel MacRee or said Pierre or Mary MacRee, as devisee of Samuel MacRee, ever were the owners of any part of said certificate or location, but admits that said Samuel did devise to her his title, whatever that was.

Defendant denies that the premises were, prior to the institution of this suit, worth one hundred thousand dollars, and says the utmost value thereof in June, 1862, when the patent issued, was fifteen thousand dollars.

86 He denies that the consideration of the conveyance from Mrs. MacRee to him was only ten dollars, and avers that the consideration was his faithful services in protecting her from the persistent, illegal, and immoral attempt of Mr. Charles P. Chouteau and Mrs. Julia Maffitt to eject her from her homestead, which she and her ancestors therein had held at that time for fifty-five years.

As to the value of defendants' title, that does not depend on the facetious counsel who drew the answer, nor does it add to his standing as a lawyer to put such trash in a legal document.

Defendant denies that he ever claimed the whole tract of 640 acres as against Mrs. Mary MacRee, or that his conveyance to her was any part of the consideration of her conveyance of the 64 acres to him, or that there was ever any agreement between her and him as to her conveyance to him of the 64 acres, and he will state hereinafter how this mat-
87 ter—the allegation that the consideration of the deed from her to him for the 64 acres was that he would procure a patent direct to

her for the whole tract, which he faithfully promised her to accomplish as her agent and attorney—is wilfully and notoriously false.

Defendant denies that he ever represented untruly to the surveyor-general that Mrs. MacRee was the only rightful owner of said creation, under certificate No. 150, or that the survey of 1818, by Brown, was set aside upon any such supposition, or that he made any request to the surveyor-general to set it aside, but he admits for the purposes of this location (and this action only) that it was set aside by the surveyor-general as alleged by plaintiffs.

He denies that said Chouteau was assignee of said location, or any part thereof, or that defendant knew it, or that he or Mrs. MacRee ever had any purpose to have a survey posterior to the alleged deed of
88 Samuel MacRee to Chouteau, and thereby to defeat his claims.

Defendant denies that he or Mrs. MacRee ever pretended or affected to make a new or different location of said certificate, or to rescind or set aside the location already made, that is, in 1818, by Brown; or that he or any one did approach the recorder of land titles at St. Louis, and procure from him patent certificate No. 494, on which the patent issued except as hereinafter stated, or that he or Mrs. MacRee, did untruly represent to the Commissioner of the General Land Office, or to the President of the United States, that all the right of O'Carroll to said certificate, had come to and was vested in Mrs. MacRee.

Defendant admits that he for Mrs. MacRee did claim that she owned the whole tract under O'Carroll, and that a patent was issued to her on the 10th day of June, 1862, and that it vested in her the title to the whole of the sixty-four acres described in the petition.

89 Defendant denies that he ever knew, or in fact that Chouteau was the owner or holder of any portion of said location, or held any part of it, *as* Mrs. MacRee held any part of it, or that either of them held any portion of it under Samuel MacRee, although defendant knew of the alleged deeds to and from said Samuel so far, and so far only, as they appear of record, or that he ever made any statement to the Commissioner of the General Land Office, or the President of the United States, with the intention to deceive either of them, or to defraud or injure said Pierre Chouteau, or that the order setting aside patent certificate No. 447, issued August 16th, 1841, or its approval by the Commissioner of the General Land Office, or the Secretary of the Interior, was made with any design to defraud said Pierre, or with any illegal or fraudulent purpose.

Defendant well knew, as anyone must have known, that as both
90 patent certificates were issued long after the said alleged deed to Chouteau from MacRee was made, and even recorded, the deed being recorded in 1840, and the first transcript plat of the survey being returned to the recorder of land titles, and the patent certificate issued on the 16th August, 1841, that therefore the alteration of the certificates would not affect the rights of the parties hereto. In either case the deed of MacRee to Chouteau, was made long before the survey was returned to the recorder of land titles.

Defendant denies any purpose or design to defeat any meritorious title of said Pierre, and says he never had any title whatever to defeat.

Defendant denies that said patent was issued by fraud, covin, or mis-

representation made by him, or Mrs. MacRee or any one, or to defeat any right of said Pierre, or that any title thereby conveyed was taken
91 or held by Mrs. MacRee in trust for or to the use of said Pierre, or that the only title of Mrs. MacRee or defendant was under said Samuel MacRee, or that neither of them ever paid anything for any other new or additional interest in said land, location, or certificate after said Samuel's death, and denies that he or Mrs. MacRee made any false or fraudulent pretences to that effect.

On the contrary, the charge in the answer that Mrs. MacRee paid nothing for any other title is itself wilfully and knowingly false.

Defendant denies that the patent was issued in consideration of or based upon any portion of the certificate or location assigned to Chouteau, or owned by him, or in which he had any interest, or that any of it was purchased with the money or certificate of said Chouteau, or that said Samuel, or any one, is equitably estopped from disturbing the same, or from withdrawing the location at the time of any sale to Chouteau.

92 Defendant denies that neither he or Mrs. MacRee had any more meritorious claim to the 64 acres than the withdrawing of the survey of 1818 could give them, or that plaintiffs would acquire any right to the legal title by patent on account of any want of merit in plaintiff's claim, unless they prove an equitable right in themselves, or that the only consideration which Mrs. MacRee surrendered to the United States for the patent upon the 64 acres was that portion of the certificate owned by Chouteau, or that he, Chouteau, ever owned any portion of it.

Defendant denies that the land department, or the officers thereof, committed an error or violation of law, or fraud upon plaintiff in issuing said patent direct to Mrs. MacRee, or inserted any false statement therein, or that plaintiffs have any right to question the action of said officers in that behalf.

Defendant denies that plaintiffs are advised, or that, in fact, any
93 right which Samuel MacRee or Christian Wilt ever had prior to 1841, was inchoate and in process of maturity into a perfect right, or contingent, so as to be the proper subject as an equitable agreement to vest the land in such assignee at any time, or equitably estop anyone from asserting the contrary, or defeat the consummation of any perfect right by any preventative act; or that any such conveyance was ever made to said Pierre Chouteau.

Defendant admits the conveyance to him by Mrs. MacRee of the 64 acres, on the 8th day of August, 1862, in consideration that he had been her selected counselor, agent, and attorney, and as an evidence of her appreciation of the zeal and fidelity he had manifested in her cause, but with the exception that he agreed to pay Mrs. MacRee seven thousand dollars, being the costs of the case of Chouteau et al. vs. MacRee and others, hereinafter mentioned, as part consideration for said deed, if he recovered.

94 He denies that it was made in pursuance of any agreement implied in her previous deeds to him, as will be set forth hereafter, or that he made a remitter as alleged.

Defendant denies that plaintiffs are entitled to the relief prayed for, or to any relief whatever.

Defendant further answering says:

I. On the 17th February, 1815, when the New Madrid act was passed,

George Ruddle was the owner of three several tracts of land in New Madrid County, other than his claim to the O'Carroll tract, all injured by earthquakes, and he, under and in pursuance of said act, applied for and obtained from the United States three several New Madrid certificates, Nos. 80, 81, and 358, (Exhibits 1, 2, 3), in lieu of said three tracts respectively, the same amounting in all to six hundred and forty acres, all being in the name of George Ruddle himself and the one No. 358
95 containing on its face this statement by the recorder of land titles: "The said quantity of 320 acres making, together with certificates No. 80 and No. 81, heretofore issued to said Ruddle, the amount of relief provided for him by the said act." That patent certificates were issued on each of said three certificates, 80, 81, and 358, long prior to the patent certificate on which the patent to Mrs. MacRee was issued. The said act prohibited any exchange to one man for more than 640 acres.

Defendant further says that while searching for papers in the Government archives, in case of Mackay vs. Easton, he first discovered the facts first above stated; that they were unknown to him or Mrs. MacRee when the patent issued or for some years afterwards; but he now avers that the issue of certificate No. 150 to George Ruddle, under the name of "O'Carroll, or his representatives," was in violation of the said New Madrid act, and a fraud upon the United States, and that said Ruddle did not
96 thereby acquire any equitable right against the Government, or its grantee, Mrs. MacRee, nor any right to question any act of the officers of the Interior Department or General Land Office in granting (rightfully or wrongfully) the land in dispute to Mrs. MacRee; that no court of justice can entertain a claim which is a fraud upon the Government and a violation of the very act of Congress on which it is claimed to be founded.

II. That George Ruddle, by deed dated Nov. 1, 1815, recorded Nov. 3, 1815, book C, page 9, New Madrid County, conveyed to George Dameron and his representatives "a certain part of a tract or parcel of land of two hundred arpens, situated in the Little Prairie Township, lying and being in the county of New Madrid and Territory of Missouri, and about two and a half miles from the village of Little Prairie, and adjoining part of the same tract sold by the said Ruddle to William Rogerson, the lower side down a bayou, and known by the name of James Young O'Carroll's
97 head-right, which said tract of land has been materially injured by earthquakes," and by said deed also conveyed to the grantee therein any right of said Ruddle to exchange the same with the United States, under said New Madrid act, for other lands.

Defendant says, first, none of the rights of said Dameron under said deed ever vested in plaintiffs; second, that all his rights have been by various deeds from his heirs and assigns vested in Mrs. MacRee and defendant.

III. That said Ruddle by deed dated February 23, 1811, conveyed to William Rogers (alias Rogerson) two hundred arpens of land which originally belonged to O'Carroll in New Madrid County; that said Rogers conveyed the same to John Ruddle by deed dated August 18, 1817, and said Ruddle conveyed the same to Mary MacRee in 1851, and that all the rights of said Rogers (alias Rogerson) were duly conveyed to and
98 vested in Mrs. MacRee, when said patent issued to her, as well as by subsequent deeds from the representatives of Rogers.

IV. That about the year 1856 Mrs. MacRee, being advised by H. R. Gamble, H. S. Geyer, and Edward Bates, and defendant, and believing that the alleged conveyance from George Ruddle to Tanner, Gillespie and Dameron, and Andrew P. Gillispie, were ineffectual to pass the right, whatever it was, of said Ruddle to said certificate or located land, procured sundry conveyances for the 640 acres from all the heirs and assigns of said Ruddle, he being then dead, and she paying therefor about or a little more than $4,000 in gold. In these purchases defendant acted as her agent, and advanced the $4,000, took some of the deeds in his own name, but at her instance and request, and always and avowedly in trust for her.

V. That William and Samuel MacRee were both distinguished officers of the regular Army, that Samuel with the exception of a few
99 years, or perhaps months, was engaged all his life in distant service in camp, post, or field duty on the frontier, or in the wars of his time, and was therefore seldom in St. Louis, and that he knew but little about land title, even those he inherited from his brother William; that said Pierre Chouteau, jr., was, on the contrary, an Indian trader, generally residing in St. Louis, well versed in matters pertaining to land and business operations generally. That said Pierre had no other color or pretence of title to said sixty-four acres than his claim under the utterly void deed of Wash to him in 1824, and thereupon he did approach the said Samuel, and did first declare to him that his said Samuel's title was not worth anything, and then did corruptly, with intent to cheat and deceive the said Samuel, falsely (and without the least color or pretence of any right of interest in the premises) lay claim in himself to one-half of the whole tract of 640 acres, and so he did overreach the said Samuel,
100 and it was thus the deed to him of August 30, 1838, was made, and said deed was made without any consideration for it.

Defendant further says that said Samuel was paymaster-general of Scott's army in Mexico, and after his return with that army was stationed in St. Louis, and shortly thereafter died, leaving his widow and two infant sons a large landed estate, among which was a valuable tract of eighty arpens in the Prairie des Noyers, and fronting Grand avenue, in the city of St. Louis, and being his homestead, and which said Samuel and his ancestors in the land had possessed for more than fifty consecutive years.

That shortly after said Samuel's death, the said Mary being then a widow, and her two children being mere infants, and wholly unacquainted with her own titles, the said Charles P. Chouteau and Julia Maffitt,
101 conspiring with others to cheat and defraud the said Mary out of her said homestead, notwithstanding her ancient possession of it, and the fact that their grandmother had in writing declared their claim to it to be founded on a mere mistake in a deed, and notwithstanding the making of said alleged deed by said Samuel to said Pierre in 1838, for the 64 acres in the manner above stated, did bring an action of ejectment against said Mary for her said homestead, founding their claim on a "dry technical point," "without the semblance of justice." Mrs. MacRee thereupon employed defendant to defend her against said Charles P. Chouteau and Julia Maffit, and others.

And Mrs. MacRee and defendant then (long before 1862) set about obtaining the title to the whole of said 640 acres, including said 64 acres, claiming the perfect right to do so, and defendant has often and openly avowed and proclaimed the same, and here reiterates it.

102 After said Mary obtained the title and right to the whole she granted defendant the 64 acres, in consideration of his zeal and fidelity in her cause with said Charles P. Chouteau and Julia Maffitt, and for refunding to her if he gained the land her costs in that case, amounting to $7,000, as was well known to them when they falsely charged in their answer that Mrs. MacRee conveyed defendant the sixty-four acres for his zeal and fidelity in getting the patent for her.

Defendant further says that during the pendency of said case of Chouteau and Maffitt et al. vs. MacRee, and after it had been prosecuted by them through all the courts of this State, and after the supreme court of Missouri had, in an opinion reported and published in 24 Mo. Rep., 126, pronounced and denounced the claim of said Charles P. Chouteau and Julia Maffitt to be founded on a "dry, technical point" and "without the
103 semblance of justice," and after Mrs. MacRee had granted defendant said sixty-four acres, and while he was acting in said case as leading counsel, Geyer, Gamble and Bates assisting, and while he was receiving and to receive fees amounting to several thousand dollars, which Mrs. MacRee was freely paying, yet, moved by a desire to relieve his generous client from the burden of law, he repeatedly proposed to said Chouteau to convey the sixty-four acres to him if he, Chouteau, would stop the litigation against Mrs. MacRee, although he, defendant, would thereby abandon his fees as well as his land (as plaintiffs aver worth over one hundred thousand dollars), and get nothing whatever for himself in return, nor was the sixty-four acres given to him with any condition or understanding that he was to so use the title.

To this end defendant addressed and delivered to John R. Shepley, then and now counsel for Chouteau, a note on the 2nd April, 1857, from which the following are extracts:

104 "I (Gibson) do not covet any of Mr. Chouteau's land, but at the same time I do not intend that he shall have any of Mrs. MacRee's land, who is my client. I am willing to have either war or peace. It is for Mr. Chouteau to choose for himself; but if war, the blows will not be all on his side. As to who will be most successful time and the courts will determine.

"If Mr. Chouteau will cause the title of Gratiot heirs to be vested in Mrs. MacRee, and pay me one thousand dollars, which is about his share of fees and costs in the case of Home vs. Fenn, tried at the circuit court of the United States, and of the amount paid by me to the heirs of Ruddle, I will convey to him."

Chouteau and Maffitt, however, eager to grasp the MacRee homestead, then worth two hundred thousand dollars in gold, did not accept defendant's proposition, but continued to prosecute their "dry, technical
105 point without the semblance of justice" to final judgment in the Supreme Court of the United States, where they finally and forever lost it.

Defendant says that said case of Home vs. Fenn, referred to in said note, was brought by Glover and Richardson, attorneys for Holme, and involved the Wilt claim as, to, and under the Dameron deed to the whole tract of 640 acres. It was decided in 35 Mo., 293. Suit was brought against the tenants of all parties. Fenn was tenant of MacRee. Chouteau skulked behind with his cases, would contribute nothing to the common defense,

and so Mrs. MacRee was forced to defend the case at a cost of several thousand dollars in fees, paid to Gamble, Geyer and Bates, and general costs of the case.

On the 30th November, 1857, defendant served on said Charles P. Chouteau notice in writing that all propositions and attempts to compromise were at an end, and that he would prosecute his case.

106 On the 31st January, 1857, defendant commenced ejectment vs. said Pierre Chouteau, C. P. Chouteau, and others, for the 64 acres. The writ was duly served on defendants.

The above facts occurred years before any application was made for the patent, and were well known to defendants when the answer was filed in this case.

In 1862 defendant conveyed the sixty-four acres to Mrs. MacRee, and in November of that year dismissed said ejectment against Chouteau.

After the patent of June 10, 1862, was issued to Mrs. MacRee, she reconveyed the same 64 acres to plaintiff. The only consideration she ever paid or intended or promised to pay any one for obtaining the patent was one and a half acres of ground on the old Manchester road, which she paid, one half to defendant and the other half to Montgomery Blair, as counsel in the case, being equal to about $500.00 to each.

107 Defendant further says that Mrs. MacRee, when making application for said patent, filed in the General Land Office of the United States with her application a certified copy of the alleged deed of Samuel MacRee to Pierre Chouteau, jr., dated and delivered 30 August, 1838, and also an abstract of his (Chouteau's) title to said 64 acres, made by Henry W. Williams, an examiner of real-estate titles of much experience and caution; and the claim of said Chouteau being thus fully and fairly presented and laid before the department, the said MacRee claimed that a patent should issue to her direct as assignee of O'Carroll, and this she clearly had the right to do. That she made no pretence to any title which she did not undoubtedly have, and obtained the grant in the fair and legitimate prosecution of her claim, whatever it was, and defendant says that plaintiffs are in no position, and have no right, legal or equitable,

108 to question the legality, equity, or propriety of the grant so made to her, and if any one is injured it is the Government and not the plaintiffs; that defendants are mere intruders, without the shadow of a title, legal or equitable.

Defendant admits and avers that Samuel MacRee devised to her all the title or interest he ever had to or in said premises, but denies that said Samuel was the common grantor of the plaintiffs and defendant to any portion of the premises, and says that she had when the patent issued to her other and better rights and titles than said Samuel's, which she bought with her own money, advanced to her by defendant for that purpose.

Defendant says that it is true that he commenced a civil action in the St. Louis land court against Pierre Chouteau and others (and afterwards continued against these plaintiffs and his devisees) to establish his title to and to recover possession of said sixty-four acres, which action was

109 brought on the 24th September, 1862, and final judgment in said land court in favor of the plaintiff, Gibson, was therein rendered at the October term, 1864, and on Saturday, January 28th, 1865; and de-

fendant avers that Pierre Chouteau, jr., and others, defendants in that case, put in issue, set up, and had the benefit of the same claim to the equitable right or title they set up in this petition; that every document under which they claim in this case was put in evidence in that case, and every point and argument even under which plaintiffs claim in this case were pleaded, set up, and claimed by them and involved and determined in that case, and defendant relies on the judgment so rendered in that case as a bar to plaintiff's claim to the equitable right set up in their petition in this case.

Defendant further says that after the rendition of said judgment and decree in the St. Louis land court, said Pierre Chouteau, jr., and others, defendants therein, took an appeal to the supreme court of Mo.; that
110 said Pierre's counsel, Mr. Hill, before said case came on for hearing in the supreme court, requested the plaintiff to agree, and he did, on the 22nd Nov., 1866, agree, in writing, to insert in the transcript filed in that court certain of the conveyances under which said Pierre claimed, and these plaintiffs now claim the equitable right in order to enable him to raise, and, if possible, to maintain his claim to the equitable right in that court and the Supreme Court of the United States.

That said case was elaborately argued by Messrs. Glover and Shepley, Britton A. Hill, and Louis V. Bogy, counsel for said defendants therein, both orally and in print, at the October term, 1866, of the supreme court of Mo., on the claim of the defendants therein to the equitable right. That plaintiff Gibson appeared alone, for himself, and raised the objection that the pleadings did not authorize the court to consider or determine defendant's claim to the equitable right; that defendant's counsel therein
111 argued elaborately that the pleadings did raise the issue, and that the title by patent enured to them; that the deed from Samuel MacRee was an equitable assignment pro tanto of the land and certificate, and that he and plaintiff Gibson were estopped from claiming the land, and did present to the court all the legal and equitable propositions presented by their petition in this case.

Thereupon the supreme court overruled plaintiff Gibson's objections on all the points and decided that it was competent for them (defendants) therein to show, if they could, that they were the owners of the equitable right, but the court also decided that the defendants therein, on the evidence given in that case, which is the same evidence set forth in the petition in this case, were not the owners of the equitable title or right; that they had not the shadow of a title, legal or equitable, and were intruders; that defendants therein thereupon filed a motion for a rehearing,
112 and in said motion abandoned all claim to the equitable right, if the court would grant them a rehearing on the question of the statute of limitations only; that the court granted said motion as to the statute of limitations, and ordered a rehearing on that question, and also as to the effect of the decree in chancery in 1821 in favor of Hertzog, and set the case for argument on the questions only at the March term, 1866; that defendants' counsel therein, at said March term, 1866, again argued their whole claim to the equitable right; that the court, notwithstanding the order confining the rehearing to the two questions only, permitted defendants' counsel therein to reargue the whole case, including the equitable branch of the case, without notice to the plaintiff Gibson, but again decided

the equitable branch of the case against them and declared that it was so "manifest as not to require discussion at length;" but it decided against plaintiff Gibson on the question of limitation
113 and that only; that the clerk, however, entered a judgment reversing the judgment of the land court in favor of plaintiff generally, and without stating upon what grounds it was reversed; that plaintiff Gibson then sued out a writ of error from the judgment of reversal to the Supreme Court of the United States; that defendants, by counsel therein, appeared in the Supreme Court of the United States and fully argued their claim to the equity and their right to show it, in that case, under the pleadings and practice of Missouri, and by motion in writing, and by argument orally and in writing, insisted that inasmuch as that court paid no attention to the opinions of the Supreme Court of the United States and regarded the record proper only when determining its jurisdiction, and as the record, that is, the judgment of reversal proper, did not show the grounds upon which the decision was made, and as the plead-
114 ings and evidence in the case raised the claim of the defendants therein to the equitable right, and the judgment might from the record proper have been against plaintiff Gibson on the equity branch of the case, therefore that court had no jurisdiction; that said court did so decide, and dismissed plaintiff Gibson's writ of error (and ordered him to pay costs, which he did), for the sole and only reason that the pleadings and evidence raised the same questions in equity now set up in this answer, and that it might have been that the State supreme court had decided against plaintiff Gibson on defendants' claim to the equitable right; that plaintiff thereupon moved the supreme court of Missouri to set aside the judgment rendered at its March term, 1867, and enter a new judgment showing that the decision was in favor of plaintiff on the equity branch of the case, and against him on the statute of limitations only; that defendants'
115 counsel therein resisted said motion by argument and brief; that the court sustained the motion and entered judgment nunc pro tunc, stating that the decision was in favor of plaintiff Gibson on the equity branch of the case; that plaintiff Gibson then sued out a second writ of error to this judgment of reversal; that upon hearing under that writ defendants Chouteau and Maffitt orally and in print again urged their claim to the equitable right and their right to take the benefit of it under the pleadings and practice in Missouri; that the Supreme Court of the United States then decided that as the record as amended proved that the defendants therein had not connected themselves with the equitable right, and that the decision of the supreme court of Missouri was in favor of plaintiff Gibson upon the equity branch of the case, and that the limitation did not run against plaintiff's title until the patent issued, it
116 reversed its judgment of reversal; that plaintiff thereupon moved the supreme court of this State to enter judgment in his favor on the ground that every question, legal and equitable, had been decided in his favor; that upon the hearing thereof defendants therein, by counsel, insisted that the case then stood as it came from the land court, notwithstanding the said order for a rehearing in 1866, opened the case upon the question of limitation and the effect of the Hertzog decree only, and further insisted orally and by brief that any judgment rendered in favor of

plaintiff was no bar against defendants therein; that the supreme court thereupon decided that the judgment therein rendered was a bar as to any claim by defendants under the New Madrid certificate No. 150, and sustained plaintiff, Gibson's motion, and affirmed the judgment of the land court upon condition that plaintiff Gibson would remit as to land em-
117 braced in certain conflicting claims, being no part of the land now in possession of Gibson; and he now avers that said remitter, as to all that portion of the premises described in the petition in this case, and south of United States survey No. 3308, was entered on the record by mistake, and was not reversed in the patent, and the judgment below was so affirmed as to all that portion of the sixty-four acres now in possession of defendant; that the only question involved in or presented in said case, under the New Madrid title, was the question of limitation and the validity of the patent of 1862, except the questions relating to the claim of plaintiffs to the equitable right; that said case, owing mainly to the persistent claim of defendants therein to set up and try and determine their right to the equity under the practice in Missouri, and the pleadings in the case, caused the same to be delayed many years, and that the case did last about ten years, mainly for that reason; that plaintiff was
118 thereby put to great trouble, vexation, and an expense, over and above his own time and professional labor, to wit, about three thousand dollars in cash; and that his time and professional labor therein were worth more than three thousand dollars in addition; and defendant now says these facts both estop and bar plaintiffs from again setting up or ever insisting in any court of justice upon any claim to the inchoate right under the New Madrid title, or the title conveyed by the patent of June 10, 1862; and that it would be inequitable and unjust to defendant to permit them to do so.

Plaintiff further says that said Chouteau took possession of about seventy acres, being about six acres more than he had any right or pretence to, and still continues to hold possession of part of said surplus, and being part of the land described in the petition in this case.

Defendant denies that he ever wrongfully entered into possession
119 of any portion of said sixty-four acres under any fraudulent patent to Mrs. MacRee, but says he did enter into part of the same under and by virtue of the judgment of said St. Louis land court, rendered in his favor upon a full hearing of all the title, rights, and claims, legal and equitable, of all parties, being the same set forth in the pleadings in this case, and which was affirmed by all the courts of the State and of the United States, after four trials on the merits in the supreme court of this State, and two in the Supreme Court of the United States.

He denies that the rents and the profits of the portion of said sixty-four acres held by him exceeds $500 per annum.

Defendant says that in the case of Gibson vs. Chouteau et al., pending when and long before this suit was commenced, being to to the term of this court, plaintiffs, in their answer, set up the same cause of action contained in this petition, and are still insisting in this court
120 on the same, and defendant will rely upon the same as a defense to this suit.

Defendant prays for judgment in his favor.

C. GIBSON.

NOBLE and URRICK, *P. Q.*

Replication.

And afterwards, to wit, on the 11th day of February, 1876, plaintiffs filed their reply to defendant's answer in words and figures following, to wit:

And now at this day come the plaintiffs, Chouteau and Maffitt, and for reply to the answer of the defendant herein, state that they deny all the affirmative matter, averments, and allegations in said answer, and each and every affirmative averment and allegation therein, and require proof thereof.

GLOVER AND SHEPLEY,
For Plaintiffs.

And afterwards, at the October term, A. D. 1877, of said court, the following proceedings were had in said cause, to wit:

121 *Judgment.—Mo. for rehearing filed.*

MONDAY, *October 22nd*, 1877.

CHARLES P. CHOUTEAU AND JULIA MAFFITT
vs. } 27189.
CHARLES GIBSON.

Now come again the parties aforesaid, both plaintiffs and defendant, by their respective attorneys, and the matters and things shown by the pleadings, exhibits, and proofs in the cause, having been seen by the court here fully understood, it is thereupon ordered, adjudged, and decreed that the said petition or bill of complaint of the said plaintiffs be dismissed, and that the defendant recover of the said plaintiffs his costs and charges herein expended and have execution therefor.

Motion for rehearing filed.

Mo. for rehearing overruled.

WEDNESDAY, *November 28th*, 1877.

Now at this day the motion heretofore filed herein for rehearing, being submitted to the court and duly considered, is overruled.

Bill of exceptions filed and appeal granted.

Now at this day come the plaintiffs, by attorneys, and file herein their bill of exceptions, and on their motion it is ordered by the court
122 that the said plaintiffs be allowed an appeal to the St. Louis court of appeals.

Affidavit filed.

Appeal bond filed and approved.

Which said bill of exceptions, affidavit for appeal, and appeal bond, respectively are in words and figures following, to wit:

Bill of exceptions.

Be it remembered that at the trial of this cause the plaintiffs, after reading the pleadings, put in evidence the following documents, that is to say:

First. New Madrid certificate No. 150, as follows:

Exhibit No. 1.—New Madrid certif. No. 150.

No. 150.] OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, November 30th, 1815.

I certify that a tract of six hundred and forty acres of land on the Mississippi, in the county of New Madrid, which appears from the books in this office to be owned by James Y. O'Carroll, has been materially injured by earthquakes; and that in conformity to the provisions of the act of Congress of the 17th February, 1815, the said James
123 Y. O'Carroll, or his legal representatives, is entitled to locate six hundred and forty acres on any of the public lands of the Territory of Missouri the sale of which is authorized by law.

FREDERICK BATES.

OFFICE OF THE SURVEYOR GEN'L,
St. Louis, Dec. 20th, 1850.

I certify that the above is a copy of the original certificate No. 150, now on file in this office of Frederick Bates, recorder of land titles, in the Territory of Missouri, issued under the provisions of the act of Congress therein mentioned, of the 17th of Feb., 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes."

M. LEWIS CLARK,
Surveyor General.

Second. Copy of deed from James Y. O'Carroll to George Ruddle, dated Nov. 29th, 1815.

Exhibit No. 2.—Deed J. Y. O'Carroll to George Ruddle, dated Nov. 29th, 1805.

On the 18th day of March, 1809, the following deed of sale was
124 presented to be, and was, recorded the same day.

This indenture, made this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and five, by and between James Young O'Carroll, of the Territory of the Little Prairie, in the district of New Madrid, and Territory of Louisiana, of the one part, and George Ruddle, of the township, district, and Territory aforesaid, of the other part, witnesseth, that for and in consideration of the sum of four hundred dollars to him in hand paid, the receipt whereof is hereby acknowledged—and the said George Ruddle, his heirs, executors, &c., forever discharge exonerated and acquitted the said James Young O'Carroll—hath granted, bargained, alienated, conveyed, and confirmed, and doth by these presents grant, bargain, sell, alienate, release, convey, and confirm to the said George Ruddle, his heirs and assigns forever, all that tract, parcel or

parcels, of land situate near the Mississippi, about two miles above
125 the village of the Little Prairie, it being the settlement right of the said James Young O'Carroll, under the second section of the law of Congress, within the district of Louisiana and the Territory of Orleans, and every part, parcel, acre, or arpent thereof which may be confirmed to him, the said James Young O'Carrol, by the commissioners of the United States or by the United States in Congress assembled, are hereby conveyed, bargained, and sold to the said George Ruddle, together with all the appurtenances thereto belonging or in anywise appertaining, and all the right, interest, and estate of him, the said James Young O'Carrol, is hereby bargained, sold, and transferred to the said George Ruddle forever. Moreover, the said James Young O'Carroll doth agree for himself and his heirs, &c., to and with the said George Ruddle, his heirs and assigns, that he will warrant and defend the same land and premises against the lawful claim of any person and every and all persons through, by, or under him.

In witness whereof the James Young O'Carrol hath here-
126 unto set his hand and affixed his seal this day and date first above mentioned.

JAMES Y'G his + mark. O'CARROL. [SEAL.]

Signed, sealed, and delivered in presence of us.
FRANCIS LESIEUR.
M. AMOREAUX.

Received on the day of the date of the within conveyance the within-mentioned sum of four hundred dollars, it being the full consideration money as aforesaid.

JAMES Y'G his + mark. O'CARROL. [SEAL.]

Test:
JOSH. HUMPHREYS.
M. AMOREAUX.

DISTRICT OF NEW MADRID, *sd:*

On the 29th day of November, 1805, personally appeared the within-signed James Young O'Carrol, before me, Michael Amoreaux, a justice of the court of common pleas, of said district, and acknowledged the within instrument to be his act and deed, all the lands and premises therein mentioned to be conveyed to the within-mentioned George Ruddle, and his heirs and assigns forever.

127 M. AMOREAUX, *J. C. P.*

I, Alphonse Delaroderie, clerk of the circuit court and ex officio recorder for the county of New Madrid, in the State of Missouri, do hereby certify to be a true and correct copy from the records in my office of the deed of James Y. O'Carroll to George Ruddle, and of all that appertains to the same now of record in book No. 3, pages 37 and 38, of New Madrid County records.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at office, in the town of New Madrid, the 30th day of December, A. D. 1847.

[SEAL.] ALP'E DELARODERIE, *Clerk.*

Third. Deposition of Michael Brenham as follows:

Deposition of Mich'l Branham.

MICHAEL BRANHAM, of lawful age, being sworn and examined on the part of defendants, deposeth and saith:

Question (by defendants). What is your age, name, and where do you reside?

Answer. My name is Michael Branham; my age, as well as I am
128 informed in (93) ninety-three years; I reside in Dunklin County, in the State of Missouri.

Question (by def'ts). Did you ever know James Y. O'Carroll, of Little Prairie Township, in the county of New Madrid, in the State of Missouri? If you knew him, state where, when, and how long you knew him.

A. I came to the county of New Madrid, State of Missouri, I think, about sixty years ago; would say about the year A. D. 1802. At that time James Y. O'Carroll was living in the county of New Madrid, township of Little Prairie, now State of Missouri, on or near the Mississippi River, three or three and a half miles above the village of Little Prairie; he continued to reside in Little Prairie Township for two or three years after I first knew him; he then left the county and I never saw or knew of him after that time.

Q. (by def'ts). Did James Y. O'Carroll own or occupy any land; if so, where was it situate, and what was its extent or area in arpens?

A. O'Carroll owned or occupied land, as before stated, three or
129 three and a half miles above the village of Little Prairie, which I understood he claimed by virtue of a permit or settlement right from the Spanish Government, but what quantity owned or claimed, I don't know.

Q. (by plaintiff). Did you ever know or hear of O'Carroll possessing or owning any other settlement in the county of New Madrid than the one known as his in Little Prairie Township?

A. I knew of his owning or claiming no other place or land than that before mentioned by me.

Q. (by def'ts). How did the land occupied or claimed by O'Carroll, and known as the O'Carroll settlement right, front east, and how it run for quantity?

A. It fronted east on the Mississippi River, or as near as could be, as I understood the Spanish Government reserved along the banks of the river highway. I cannot state how it ran as to quantity.

Q. (by def'ts). Was there any bayou near said tract of land or running through it?

A. Not knowing the boundary of the tract of land cannot state definitely. There was one bayou running into the Mississippi River
130 about a mile and a half above the place known as the O'Carroll improvements, and another that entered the river about a mile

below said improvement, and one other back or west of the said improvement some two miles; but whether either of said bayous run through said tract of land or not, I cannot state.

Q. (by def't). You state there was one bayou above and one below and one west of the O'Carroll improvement; can you state definitely whether or not, within the boundary described by these bayous there was any bayou?

A. There may have been, and I think there were several sloughs, but nothing that we called a bayou.

Q. (by def'ts). Had James Y. O'Carroll a wife and children? If he had children, how many?

A. O'Carroll had a wife and some children, but how many children I do not recollect.

Q. (by def'ts). Did O'Carroll sell said land to any one; if so, to whom, and when?

A. O'Carroll sold said tract of land to George Ruddle; I can't state the date of the sale, but the land was claimed by George Ruddle after
131 O'Carroll left the country, which was, I think in the year 1805 or 1806.

Q. (by def'ts). Did you ever know George Ruddell, who bought the O'Carroll tract of land, and where he was from?

A. I knew George Ruddell, that bought said land, well; I lived with him several years; he was formerly from Lexington, in the State of Kentucky; at least, I have so heard him say.

Q. (by def'ts). Did George Ruddell ever live on said O'Carroll tract of land?

A. I cannot say that he did or did not live on the tract, but he never lived on the place known and called the O'Carroll improvement.

Q. (by def't). How near to said improvement did George Ruddell live, and in what direction?

A. Some two miles, in a westerly direction.

Q. (by def't). Was there a bayou near where George Ruddell lived?

A. The place George Ruddell lived—stated in my last answer as above—was immediately on the bank of a bayou; there was, I think, no other bayou near the place.

Q. (by def'ts). On what part of the tract of land was the O'Carroll improvement situate?

132 A. I cannot say on what part of the tract the improvement was, only by stating that the improvement was some three or three and a half miles above the village of Little Prairie, and within two or three hundred yards of the bank of the Mississippi River.

Q. (by def'ts). Did Ruddell sell the O'Carroll tract or any part of it? If he did, state to whom sold and what part of it.

A. I do not know that Ruddell ever sold any part of said land.

Q. (by def'ts). Did you ever know George Dameron?

A. I never did, as I now recollect.

Q. (by def'ts). Do you know all the children of George Ruddell, of Kentucky? If so, state their names.

A. I know them all. Their names are Abraham, Isaac, George, John, Cornelius, Elizabeth, Sarah, and Rebecca.

Q. (by def'ts). Did you ever know any other George Ruddell in Little Prairie Township than George Ruddell, of Kentucky, and his son George?

A. I knew no other than the two mentioned.

Q. (by def't). Did you ever know or hear of more than one
133 settlement right in New Madrid County known as the O'Carroll settlement right?

A. I know of no other than the one before mentioned anywhere or any place.

Q. (by def't). How long did you live in Little Prairie Township; from what year to what year?

A. I lived in Little Prairie Township from about 1801 to 1820, with the exception of about one year, which, I think, was the year 1813.

Q. (by def'ts). Were you acquainted with the settlers in the Little Prairie Township from 1801 to 1820?

A. I knew all the settlers of said township within the time named; that is, unless it might be some one who remained in the township but a few days I did not know.

Q. (by def'ts). Did you know of the O'Carroll tract of land being injured by earthquakes in the year 1811 or 1812?

A. I think the land was so injured.

And further deponent saith not.

his
MICHAEL × BRANHAM.
mark.

Fourth. Copy of deed from George Ruddle to Gillespie and Tanner, dated March 7, 1816.

EXHIBIT 3:—*Deed from George Ruddle to Gillespie and Tanner.*

134 On the 17th day of October, 1816, received for record, and the same day recorded the following deed:

This indenture, made this 7th of March, in the year of our Lord one thousand eight hundred and sixteen, by and between George Rudle and Theadocia, his wife, of the county of Lawanto and Territory of Missouri, of the one part, and James Tanner and Andrew P. Gillaspie, of the Territory aforesaid and county of New Madrid, of the other part, witnesseth: That the said George Ruddle and Theadocia, his wife, for and in consideration of the full and just sum of five hundred and twenty-five dollars, current money of the United States, to them in hand paid by the said Tanner and Gillaspie, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath this day granted and bargained and sold, and by these presents doth grant, *doth grant*, bargain, sell, alien, release, convey, and confirm unto them, the said Tanner and Gillaspie, their heirs and
135 assigns forever, all that tract or parcel of land of five hundred and fifty arpens of lands situate, lying, and being in the county of New Madrid and township of the Little Prairie, and on the waters of the Mississippi, it being a part *a part* of the said tract of land originally claimed before the United States commissioners of land claims for the Missouri Territory, by and in the name of James Y. O'Carrel, *as* reference being had to the records of the record office *ocfis* land claims for the Missouri Territory, which said tract of land has been materially injured by earthquakes, and whereas under the act of Congress of the United States, of the 17th day of February, 1815, it is provided that person or persons

owning lands in the county of New Madrid thus ingured by earthquakes shall be entitled to locat' certain quantities of land of the United States which they shall hold in lieu of the'r ingured which ingured shall revert to and become absolutely vested in the United States;
136 all the privileges and benefits given to the said G'arge Ruddle and Theadocia his wife, by said act of Congress, which said claim has been regularly transfer'ed to the said George Ruddle, his heirs, *heirs*, and assigns, and the said George Ruddle, Theodocia his wife, *are hereby* sold and transferred to the said Tanner and Gillaspie, thare heirs and assigns forever: To have and to hold the said tract or parcel of land, togeather with all and singular the privilege'and appertenances thareonto, belonging unto them, the said Tanner and Gillaspie, and their heirs and assigns forever. And the said George Ruddle, Theadocia his wife, covenants and agrees to warrent and forever defend the said bargained and sold premises, together with the previleges and appert'ances aforesaid, unto them, the said Tanner and Gillaspie, and their heirs and assigns, free from all claims, demands, or incumberances of whatsoever nature.
137 Witness our hands and seals the day and year first abov' written.

GEORGE RUDDLE. [SEAL.]

his
THAADOPHETH + RUDDLE. [SEAL.]
mark.

Signed, sealed, and delivered in presence of us.
JOHN CHANDLER.
GEO. WEST.

This day appe'r'd before me, the undersigned, one of the justices of the peace in and for the county of Lawan, and Territory of Missouri, the within named and signed George Ruddle, and Theadocia his wife, and acknowledge the within deed to be thare act and deed, hand and seal for the use' and perpauses therein mentioned.

Given under my hand this 7 day of March, 1816.

GEORGE WEST, *J. P.*

STATE OF MISSOURI,
County of New Madrid, ss:

I, Richard H. Hatcher, clerk of the circuit court, and ex-officio recorder in and for the said county of New Madrid, do hereby certify that
138 the above and foregoing is a true, full, and complete transcript of the original record of a deed from George Ruddle and wife, to James Tanner and Andrew P. Gillaspie, together with the certificates of acknowledgement and record of same, as fully as the same appear of record in book eight, pages 116 and 117, of the records of said county.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court at office in the town of New Madrid, this 1st day of October, A. D. 1856.

[SEAL.] RICH'D H. HATCHER, *Clerk.*

Fifth. Copy of deed from Ruddle to Gillespie, dated 16th May, 1818, as follows:

On the 8th day of June, 1818, received for record, and the same day recorded the following deed:

Deed of Geo. Ruddle & wife to And'w P. Gillespie.

This indenture, made and concluded upon this 16th of May, in the year of our Lord one thousand eight hundred and eighteen, by and between George Ruddle and Theodochey his wife, of the county of Lawrence,
139 and Territory of Missourie, of the one parte and Andrew P. Gillespie of the county of New and Territory aforesaid, of the other part, witnesseth: That for and in consideration of the full *some* of five hundred dollars to them in hand paid by the said Andrew P. Gillespie, the receipt of which payment is hereby acknowledged by the said George and wife, and *he*, the said George and wife, hath this day granted, bargained, and sold, and do by these presants give, grant, bargain, and set over to him, the said Gillespie *them* tracts of land, parcels of land, situate in the county of New Madrid, and in the Little Perrairie Township, one tract of two hundred arpens, situated on the Mississippi or near the Mississippi et being a parte of James Y. O'Carroll' settlement right; also two lots in the little village, granted to John or Jean Montmeine.

To have and to hold all right, title, interest and clame, be the same more or less, of *him* the said George and wife, to the said Andrew
140 P. Gillespie, his heirs or assigns, forever.

And the said Gillespie, being well acquainted with the situation of the above-described tract and lots of land, takes the same at his own risk and hazard.

Given under our hands and seals this day and date above 'ritten.

GEORGE RUDDLE. [SEAL.]

THEODOSHETH (her mark) RUDDLE. [SEAL.]

Signed, sealed, and delivered in preasants of us.
JOHN TANNER and
ABRAHAM RUDDELL.

TERRITORY OF MISSOURI,
County of New Madrid, set:

I, Richard Sessum, justice of the peace, within and for the county of New Madrid, do hereby certify that James Tanner personally appeared before me this day, and made oath on the Holy Evangels of Almighty God, that he saw George Ruddell and Theodosea A. Ruddell, sign, seal, and deliver, and heard them acknowledge within deed of convey-
141 ance to be their act and deed, hand and seal, for the use and purposes therein expressed, and that Abraham Ruddell signed the same as witness in his presence.

Given under my hand, at office, May 26th, 1818.

RICHARD SESSAN,
Justice Peace.

STATE OF MISSOURI,
County of New Madrid, ss:

I, Richard H. Hatcher, clerk of the circuit and ex-officio recorder in and for the county of New Madrid, in the State of Missouri, do hereby

certify that the foregoing is a true, full, and complete transcript of the record of a deed from George Ruddell and wife to Andrew P. Gillespie, together with the certificate of the proof of acknowledgment of same, and the certificate of record of the same as the same appear of record on pages seventy-three and seventy-four of book number ten of the record' of said county.

In witness whereof I hereunto subscribed my name and
142 affixed the seal of said court, at office, in the town of New Madrid, this 18th day of March, A. D. 1858.

[SEAL.] RICHARD H. HATCHER,
Clerk and ex-officio Recorder.

Sixth. Copies of two deeds from Gillespie to Tanner, one dated October 17, 1816, the other June 1, 1818, as follows:

On the 18th day of October, 1816, received for record and the same day recorded the following deed:

Deed from Gillespie to Tanner, Oct. 17, 1816.

Know all men by these presents that I, Richard P. Gillaspie, of the county of Madrid and Territory of Missouri, have this day granted, bargained, and sold, and by these presents do*a*th give, grant, bargain, and set over *over* to James Tanner, of the county and Territory aforesaid, all my right, title, interest, and cla*i*me of James Y. O'Carrel, also to the cla*i*me of John Baker, 'sign'r, of two hundred and fifty arp*i*nts, and the cla*i*me confirmed to the said Baker under George Morgin, which said cla*i*me, or a part of *them*, w*a*re bought in par*d*nership by the said Andrew
143 P. Gillaspie and said James Tanner; and to the said Gillaspie for and in consideration of one hundred and ninety dollars to him in hand pa*d*e by the said James Tanner, for which he, the said Gillaspie, *do* agree to warrant and forever defend the cla*i*me that is in him against himself, his heirs or executors, or 'against any person whatsoever.

Given under my hand and seal this 17th day of October, 1816.

ANDREW P. GILLASPIE. [SEAL.]

Teste:
RICH'D H. WATERS.
RICH'D SESSUMS.

TERRITORY OF MISSOURI,
County of New Madrid, ss:

Be it remembered that on the 18th day of October, in the year eighteen hundred and sixteen, personally came and appeared before me Rich'd H. Waters, clerk of the circuit in and for the county of New Madrid, the within signed Andrew P. Gillaspie, party grantor to the within instrument in writing, and acknowledged the same to be his free and
144 voluntary act and deed, hand and seal, for the use and purposes therein expressed.

In testimony whereof, there being no judicial seal yet procured to said court, I have hereunto subscribed my name and affixed my own private seal the day and date above written.

RICHARD H. WATERS, *Clerk.*

STATE OF MISSOURI,
County of New Madrid, ss:

I, Richard H. Hatcher, clerk of the circuit court and ex-officio recorder within and for the county of New Madrid, in the State of Missouri, do hereby certify that the foregoing is a true, full, and complete transcript of a deed from Andrew P. Gillaspie to James Tanner, together with the certificates of acknowledgement and record of same, as fully as the same appear of record in book eight, pages 122 and 123, of the records of said county.

In witness whereof I hereunto subscribe my name and affix the
145 seal of said court, at office, in the town of New Madrid, this 19th day of March, A. D. 1858.

[SEAL.] RICH'D H. HATCHER, *Clerk.*

Deed from Gillaspie to Tanner.—June 1, 1818.

This indenture, made this 1st day of June, 1818, by and between Andrew P. Gillaspie, of the one parte, and James Tanner, boath of the county of New Madrid and Territory of Missourie, and he, the said Andrew P. Gillaspie, for and in consideration of the just and full some of ten dollars to him in hand paid by the said James Tanner, the receipt of which payment is hereby acknowledged by the said Gillaspie, and he, the said Andrew P. Gillaspie, has this day granted, barg'ined, and sold unto him, the said James, his heirs or assigns, forever, all the*m* tracts or parcels of land, one tract of two hundred arpens, a parte of the settlement right of James Y. O'Carrel, situate in the county of New Madrid and township of Little Perrairie. Also two lots situate in the village of Little Perrarie, granted to John or Jean Montmerry, conv*a*id by the said Mont-
146 merry to George Ruddell, and conv*a*id by the said George and wife to the said Andrew P. Gillaspie, and he, the said James Tanner, being well acquainted with the said tract of two hundred arpens and the said two lots; takes the same as his own risk and hazard.

Given under our hands and seals this day and date first above written.

ANDREW P. GILLASPIE. [SEAL.]
JAMES TANNER. [SEAL.]

Signed in pre*s*ents of us—

TERRITOY OF MISSOURI,
County of New Madrid, set:

I do hereby certify that Andrew P. Gillaspie and James Tanner personally appeared before me, a justice of the peace in and for the county of New Madrid, and acknowledged the within and foregoing deed of conveyance to be their act and deed, hand and seal, for the use and purposes therein contained.

Given under my hand, at office, June the first day, in the year eighteen hundred and eighteen.

RICHARD SESSUMS,
Justice Peace.

147 STATE OF MISSOURI,
County of New Madrid, ss:

I, Richard H. Hatcher, clerk of the circuit court in and for said county

of New Madrid, hereby certify that the foregoing is a true, full, and complete transcript of the original record of a deed from Andrew P. Gillaspie to James Tanner, with the certificate of acknowledgment of same as fully as the same remains of record in my office in book ten, page twenty-five, of the records of said county.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court at office, in the town of New Madrid, this 1st day of October, A. D. 1856.

[SEAL.] RICH'D H. HATCHER, *Clerk.*

Seventh. Copy of deed from Tanner to Christian Wilt, dated May 31, 1818, as follows:

Deed from Tanner to Christain Wilt, 31 May, 1818.

This deed and covenants made and entered into by and between
148 James Tanner, of the county of New Madrid, in the Missouri Territory, of the one part, and Christian Wilt, of the town and county of St. Louis, in the same Territory, of other part, witnesseth: That the said James Tanner, for and in consideration of the sum of twelve hundred and eighty dollars current money of the United States to him in hand paid by the said Christain Wilt, the receipt of which payment is hereby acknowledged, has granted, bargained, and sold, and does by these presents grant, bargain, and sell to the said Christian Wilt, and to his heirs and assigns forever, six hundred and forty acres of land, with the right and privilege of locating the same according to the provisions of an act of Congress of February 17th, 1815, for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes. The land and claim thereto hereby sold and conveyed being six hundred and forty acres, then rightfully and lawfully owned and
149 belonging to James Y. O'Carroll, since that time conveyed by good claim of title to the said James Tanner, who, as legal representative of the said O'Carroll, has accepted the relief offered by the said act of Congress, and procured from the recorder of land titles a certificate, No. 150, authorizing the said James Y. O'Carroll, or his legal representatives, to locate the said six hundred and forty acres on any of the public lands of said Territory, the sale of which is authorized by law, and the said James Tanner, legal representative of the said James Y. O'Carroll, does hereby authorize and empower the said Christian Wilt to locate the said six hundred and forty acres of land accordingly; and the said James Tanner, for the consideration aforesaid, hereby covenants with the said Christian Wilt that he, the said James Tanner, his heirs, and representatives, will warrant and forever defend the right and title of the said six hundred and forty acres of land wheresoever the same may be located as aforesaid,
150 accordin*d* to the lines and boundaries thereof as the same may be established by *by* final survey to him, the said Christian Wilt, his heirs and assigns, in fee-simple forever, together with all and singular the apperte*a*nances, benefits, and advantages thereunto in anywise belonging: To have and to hold the said claim and six hundred and forty acres of land with the premises aforesaid to him, the said Christian With, his heirs and assigns forever, free and clear of*f* and from all and all manner of adverse*ly* titles or claims to the same or any part thereof, and free and clear of*f* and

from all and every kind of embarrassment whatsoever. And the said James Tanner, for the aforesaid consideration, hereby further covenants with the said Christian Wilt that he, the said James Tanner, his heirs, or representatives, shall and will at any time when thereunto requested by the said Christian Wilt, his heirs, or assigns, after the said claim shall
151 be located as aforesaid, and final survey thereof made and boundaries established, make to him, the said Christian Wilt, his heirs, or assigns, a new general warrantee deed describing the particular land on which the said claim may be located as aforesaid, by the lines, courses, distances, and boundaries thereof as the same may be established by final survey.

In testimony whereof the said James Tanner has hereunto set his hand and seal, at St. Louis, this thirty-first day of , in the year 1816. (The word on the 2nd line of the other page interlined before signing.)

JAMES TANNER. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN C. SULLIVAN.
GEORGE WILSON.

MISSOURI TERRITORY,
County of St. Louis, set:

Be it remembered that on the day and date of the within instrument in writing, before me, Mary Philip Leduc, clerk of the circuit court
152 within and for the county aforesaid, personally came and appeared the within-named James Tanner and acknowledged the within instrument in writing to be his act and deed, hand and seal, for the purposes therein contained.

In witness whereof I have hereunto set my hand and seal this day and date above said.

[SEAL.] M. P. LEDUC, *Clk.*

Recorded this 25th March, 1819.

A. GAMBLE, *Clerk.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned recorder for said county, certify that the foregoing is a true copy of a deed from James Tanner to Chr'n Wilt, the certificate of acknowledgment and the date of recording, as fully as the same remain of record in my office in book H, page 237.

Witness my hand and official seal this 4th day of May, 1863.

[SEAL.] A. C. BERNOUDY, *Recorder,*
P'r J. CONRAD, *D'y.*

[U. S. rev. stamp, 10 cents.]

153 Eighth. Notice of location of certificate No. 150, by Christian Wilt, dated June 16th, 1818, as follows:

Location of certificate No. 150, *by Christ'n Wilt.*

No. 150. Christian Wilt for James Y. O'Carroll or his legal represen-

tatives enters 640 acres of land in virtue of a certificate, No. 150, dated November 30th, 1815, and issued by Frederick Bates, esquire, recorder of land titles for the Missouri Territory.

Beginning at the northwesterly corner of what is commonly called and known by the name of the Prairie or Barrier Denoyer tract or surveys of land, which said tract includes a number of surveys or parcels of land claimed by divers individuals, running from said point of beginning N. 83½ E. with the northerly boundary-line of the said Denoyer tract 320 poles, thence and from the beginning, N. 6½ W. at right angles for the quantity of six hundred and forty acres.

CHRISTIAN WILT.

NOV. 8TH, 1816.

WM. RECTOR, Esqr., *Surveyor, &c.*

154 (Class No. 35.)

OFFICE OF THE SURVEYOR-GEN'L,
St. Louis, Dec. 21st, 1850.

I certify that the above is a correct copy from the original on file in this office of the notice of the location made in virtue of certificate No. 150, issued on the *on the* 30th Nov., 1815, by Frederick Bates, recorder of land titles in the Territory of Missouri, pursuant to the act of Congress, approved on the 17th Febr., 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid who suffered by earthquakes."

M. LEWIS CLARK,
Surveyor-General.

Christian Wilt, as the legal representative of James Y. O'Carroll, enters six hundred and forty acres of land by virtue of a certificate, No. 150, dated Nov. 30th, 1815, issued by Frederick Bates, esqr., recorder of land titles, to wit: Fractional section twenty, in township forty-five north, and range seven east; the same in which St. Louis is situated, that part of fractional section seventeen, in the same township, which lies south of
155 the Cul de Sac fields, the western half of fractional section twenty-one in the same township, and so much off from the north side of the western half of the fractional section twenty-eight, in the same township as will make the quantity.

St. Louis, 16th June, 1818.

JOS. C. BROWN,
For CHRISTIAN WILT.

I certify that the former location of C. Wilt, on the above certificate interferred with the Cul de Sac fields.

16th June, 1818.

JOS. C. BROWN, *D. S.*

OFFICE OF THE SURVEYOR-GEN'L,
St. Louis, December 24th, 1850.

I certify that the above is a correct copy from the original on file in this office, of the notice of location, with the certificate of Jos. C. Brown, thereto

attached, made in virtue of certificate No. 150, issued on the 30th Nov., 1815, by Frederick Bates, recorder of land titles in the Territory of Missouri, pursuant to the act of Congress approved on 17th day of February, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid who suffered by earthquakes."

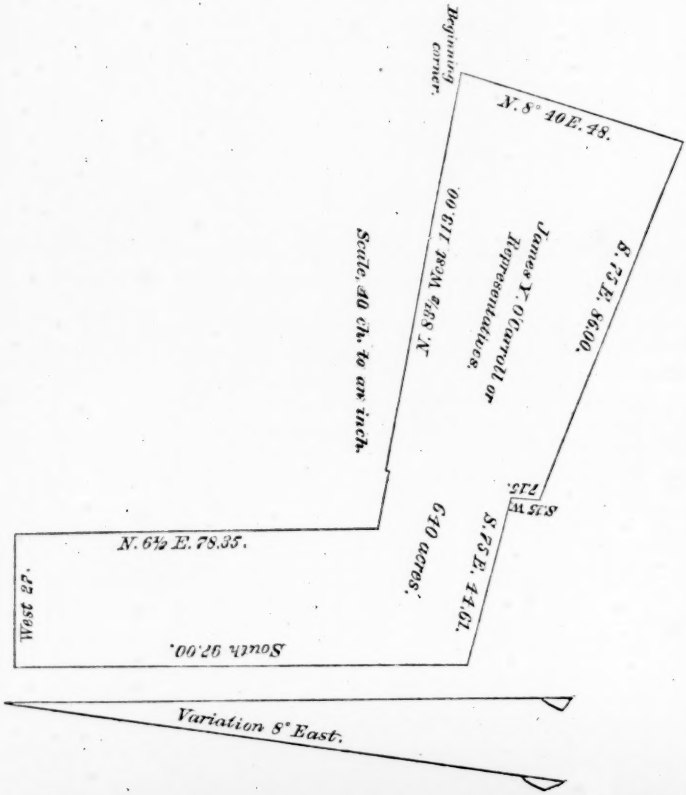
M. LEWIS CLARK,
Surveyor-General.

156 Ninth. Plat and description of S. 2498, certified by M. Lewis Clark, surveyor-general, Dec. 21, 1850, as follows:

Township No. 45 north, range No. 1 east.

Plat and description of S. 2498.

Survey No. 2498. Certificate No. 150. Surveyed for James Y. O'Carol or his legal representatives, 640 acres located by virtue of a New Madrid certificate.



Beginning at a stone the SW. corner of this tract in Charles Gratiott's line; thence N. 8° 40 E. 48 chs. to S. Dubreiul's corner, post in mound; thence S. 75 E. 86 chs. stone corner in Chouteau's line; thence S. 15 W. 7 chs. 15 links Chouteau's corner stone; thence S. 75 E. 44 chs. 61 lks. post mound in Chouteau's line; thence south 97 chs. post in mound; thence west 27 chs. set post in mound in line of field lands; thence N. 6½ E. 78 chs. 35 lks. stone NE. corner of field lands; thence with north line of field lands N. 83½ W. 113 chs. to the beginning.

April, 1818.

JOS. C. BROWN, *D. S.*

157 OFFICE OF THE SURVEYOR-GENERAL,
St. Louis, December 21st, 1850.

I certify that the above plat and description of survey N°. 2498, located under New Madrid certificate No. 150, are correctly copied from page 102 of record-book A of New Madrid surveys in this office, interferences not being shown thereon.

M. LEWIS CLARK,
Surveyor-General for Illinois and Missouri.

Tenth. Copy of deed from George Ruddle to George Dameron of Nov. 1, 1815, as follows:

Received 3rd day of Nov., 1815, and recorded the same day.

Deed from Geo. Ruddle to Geo. Dameron, Nov. 1, 1815.

This indentur', made this first day of November, A. D. eighteen hundred and fifteen, by and between George Ruddell, of the county of Lawance, Territory of Missourie, of the one part, and George Dameron, of the county of New Madrid and Territory aforesaid, of the other part, witnesseth:

That the said George Ruddell, for and in consideration of the sum of four hundred dollars, current money of the United States, to him in hand paid by the said George Dameron at or before the delivery of these
158 presents, the receipt whereof is hereby acknowledged, he this day hath granted, bargained, and sold, *and by* the said George Dameron, his heirs, executors, administrators, or assigns forever, a certain part of a tract or parcel of land of two hundred arpens, situated in the Little Prarairie Township, lying and being in the county of New Madrid and Territory of Missouri, and about two and a half miles from the village of Little Pairaire, and adjoining part of the same tract sold by the said Ruddell to a certain William Raegerson, the lower side down a *byo* (bayou), and known by the name of James Y. O'Carroll, head right, which said tract of land has been materially injured by earthquakes; and whereas, under the act of Congress of the United States of the 17th of February, 1815, it is provided that all and every person or persons owning land *land* in the county of New Madrid, in the Territory of Missouri, thus injured by earthquakes, shall be entitled to the rights, privcilages, to be
159 located, certain quantities of public lands, which they shall hold in lieu of their injured lands, which injured lands shall revert to and

become absolutely vested in the United States. All the rights, privileges, and benefits which are given to the said George Ruddell by the said act of Congress, in virtue of the aforesaid, are hereby sold and transferred by the said George Ruddell to the said George Dameroon, his heirs and assigns, forever. To have and to hold the said tract of land aforesaid, together with all and singular the privileges and appurtenances thereunto belonging unto him, the said George Demoron, his heirs and assigns, forever. And the said George Ruddell hereby covenants and agrees to warrant and forever defend the said bargained and sold premises, together with the priv*a*leges and appurt*ai*nances aforesaid, unto him, the said George Dameron, against the claim or claims of him, the said George Ruddell, his heirs, executors, and administrators, or against the
160 claim or claims of every person or persons claiming by, through, or under him, the said George Ruddell.

In witness whereof I have hereunto set my hand and affixed my seal the day and date first above written.

GEORGE RUDDELL. [SEAL.]

Signed, sealed, and delivered in the presence of us—
STEPHEN ROYS.
SAM. BALDWIN.
JOHN I. HACHER.

TERRITORY OF MISSOURI,
County of New Madrid, set:

Be it remembered that on the first day of November, A. D. eighteen hundred and fifteen, personally came and appeared before me, the undersigned, a justice of the peace in and for the county of New Madrid, the above signed George Ruddell, and acknowledged the above and within deed to be his act and deed, hand and seal, for the use and purpose therein mentioned and contained.

Given under my hand this day and date above written.

JOHN SCHRODER, *J. P.*

161 I, Alphonso Dalarodie, clerk of the circuit court and ex-officio recorder for the county of New Madrid, in the State of Missouri, do hereby certify the foregoing to be a true and correct copy from the record in my office of the deed of George Ruddell to George Dameron, and of all things appertaining to the same now of record in book No. 6, page 9, and of New Madrid County record.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at office in the town of New Madrid, this 13th day of December, A. D. 1847.

[SEAL.] ALPHO. DELARODIE, *Clerk.*

Eleventh. Copy of deed from Dameron's heirs to Tanner, dated October 2, 1816, as follows:

On the 18th day of October, 1816, received for record, and the same day recorded, the following deed:

Deed of Dameron's heirs to Tanner, Oct. 2, 1816.

This indenture, made and concluded on the 2nd day of October, in the year of our Lord one thousand eight hundred and sixteen,
162 by and between Rachel Dameron and William Nelson and John Dameron, the legal representatives and heirs of George Dameron, deceased, residenters of Warren County, Tennessee, of the first part, and James Tanner, of the county of New Madrid, and Territory of Missouri, of the second part, witness :

That for and in consideration of one hundred dollars, lawful money of the United States, to them in hand paid by the said James Tanner, at and before the sealing and delivery of *this* presents, the receipt of which is hereby acknowledged, have this granted, bargained, and sold, and by these presents doth grant, bargain, sell, ailen, set over, and release to the said James Tanner or assigns forever all that tract of two hundred arpints of land situate in the county New Madrid, in the township of Little Prairie, it being a part of the settlement-right of James T. O'Carroll, which has been conveyed *to* the said O'Carroll to George Ruddell,
163 and conveyed by George Ruddell to the said George Dameron, deceased; now, the said Rachel Dameron and William Nelson and John Dameron, the legal heirs and representatives of George Dameron, deceased, for themselves, their heirs, and administrators, doth agree to and with the said James Tanner, his heirs and assigns forever, that they will forever warrant and defend all thare rights to the above-described tract of land free from any incumbrances whatever.

Given under our hands and seals this day and date first above written.

her
RACHEL + DAMERON.
mark.
his
WILLIAM + WILSON.
mark.
JOHN DAMERON.

Signed, sealed, and delivered in presence of us—
E. N. MATTHEWS.
ANDREW P. GILLASPIE.

TERRITORY OF MISSOURI,
County of New Madrid, ss:

Personally came and appeared before me, Richard H. Waters, clerk of the circuit court in and for the county aforesaid, the within-signed
164 Andrew P. Gillaspie, one of the subscribing witnesses to the within instrument of writing, and made oath on the Holy Evangels of Almighty God that he saw the within-named Rachel Dameron, William Wilson, and John Dameron sign, seal, acknowledge, and deliver the within instrument in writing to be their hand and seal, act and deed, for the purposes therein expressed.

Given under my hand and probate seal the day and date above written.

[SEAL.] RICH'D H. WATERS, *Clerk.*

STATE OF MISSOURI,
County of New Madrid, set:

I, John A. Mott, clerk of the circuit court and ex-officio recorder in and for the county of New Madrid aforesaid, do hereby certify the foregoing is a full and complete copy of the record of deed and certificate from Rachel Dameron, William Wilson, and John Dameron to James Tanner, as the same now appears of record in book No. 8, folio 125 and
165 126 of the record of said county, now in my office.

In witness whereof I hereunto sign my name and affix the seal of said court, at office, this 30th day of July, 1863.

[SEAL.] JOHN A. MOTT,
Clerk and ex-officio Recorder.

Twelfth. Copy of deed from Joseph Hertzog to Robert Wash, trustee of Devotion, dated October 26, 1822, as follows:

Deed of trust, Hertzog to R. Wash, trustee, &c., Oct. 26, 1822.

This deed of trust, made and entered into this twenty-sixth day of October, eighteen hundred and twenty-two, by and between Joseph Hertzog, of the town and county of St. Louis, of the first part, and Robert Wash as trustee for Louis Devotion of the same place, witnesseth:

That whereas said party of the first part is indebted to the said Louis Devotion in the sum of nine thousand five hundred and forty-nine dollars, lawful money of the United States, it being the balance due on a judgment obtained by the said Devotion against the said Hertzog, in the St.
166 Louis circuit court, on which execution has issued and is now in the hands of the sheriff:

Now, therefore, in consideration of the debt aforesaid due from the said Hertzog to the said Devotion, made in consideration of the credit and indulgence hereby given the said party of the first part in the payment of said debt, and the better to secure the payment of the same, as also for *for* and in consideration of the mutual trust and confidence reposed in the said R. Wash, who is charged and entrusted with the collection of said debt in the way of his profession as the attorney at law of the said Devotion, he, the said party of the first part, hath granted, bargained, and sold, and doth hereby grant, bargain, and sell unto him, the said R. Wash, his heirs and assigns, forever, the following described town lots and tracts, or parcels of land situate, lying, and being in the State of Missouri:

First. All that lot or parcel of ground, situate, lying on the east
167 side of Main street, fronting one hundred and twenty feet (more or less) on said Main street, and running back to the bluff or bank of the river, it being the same whereon the said party of the first part now resides, and which was formerly owned by Christian Wilt, who purchased the same of Edward Hempstead and August Chouteau, as per reference to the deeds of record will more fully appear.

Second. One other lot or parcel of ground situate, lying, and being in the town of St. Louis aforesaid, on the west side of Main street, near the lower end of the same, containing about sixty feet front (more or less) on Main street, and running back one hundred and fifty feet, it being the

same formerly owned by one Joseph Henderson, who erected thereon a two-story brick house, and on which the said party of the first part has now operation a soap and candle factory.

Third. A certain tract or parcel of land situate, lying, and being in the county of St. Louis aforesaid, containing six hundred and forty
168 acres, located by Christian Wilt for James Y. O'Carroll or his legal representatives, by virtue of a certificate commonly called a New Madrid certificate (No. 150) number one hundred and fifty, dated (Nov. 30th, 1815) November the thirtieth, eighteen hundred and fifteen, as per reference to the location and plat of survey thereof in the surveyor-general's office will more fully appear.

Fourth. One other tract or parcel of land situate, lying, and being in the county of Jefferson, State of Missouri aforesaid, containing six hundred and forty acres, or thereabouts, it being the same purchased by the above-named Christian Wilt of one Judathan Kendal, commonly known as the New Hartford tract, whereon the said Wilt erected a tower for the manufactory of shot, as per reference to the title papers of record will more fully and at large appear.

To have and to hold the above sold and described premises, together with all and singular the buildings and improvements thereon,
169 unto him, the said R. Wash, his heirs and assigns, forever.

Yet in trust, and upon the express confidences: That if the said party of the first part shall pay or cause to be paid to the said party of the second part, or to the said Devotion, the aforesaid debt at the time and in the manner following, viz: one thousand dollars, together with ten per centum interest thereon, to be computed from this date, on or before the first day of March next; one-third of the balance, together with ten per centum interest thereon, to be computed from any date, on or before the first day of November, eighteen hundred and twenty-three; one other third of said balance, together with ten per centum interest thereon, to be computed as aforesaid, on or before the first day of November, eighteen hundred and twenty , and the remaining third interest thereon as aforesaid, to be computed as aforesaid, on or before the first day of November, eighteen hundred
170 and twenty-five, then this deed shall be and become null and void; and if the said party of the first part shall fail, neglect, or refuse to pay the debt aforesaid, in the manner and at the time aforesaid, together with the ten per centum interest thereon as aforesaid, it is the object and intention of this deed, and it is the express understanding of the parties hereto, that the said R. Wash, his heirs or assigns, shall have full power and authority to sell, and shall sell at public sale upon giving ten days' public notice, any, all, or so much of said property above described as he may deed sufficient to pay and satisfy the several payments so to become due as above provided for, together with the interest thereon, and the reasonable and necessary costs of proceeding to execute the trust hereby delegated; and the money arising from such sale or sales shall be received and taken in satis-
171 faction and discharge of so much of said debt; and if by the sale of any of the above-mentioned lots or tracts of land more money shall be raised than will suffice to discharge the payment becoming due as aforesaid, the same shall be applied to the subsequent payment. It is the intention, however, of the parties of these presents that whenever it becomes necessary to sell any portion of the property above described the terms of

sale shall be for so much specie in hand as will be sufficient to discharge the payment then due, and a credit for the balance to suit the payment herein provided for, it being understood that the said trustee shall not any one time offer and sell more of the real estate hereinbefore described that will be sufficient, in his opinion, to raise the installments due at the time being; and further and lastly, it is understood and agreed between said parties hereto, that such parts and parcels of said real estate as
172 shall remain unsold after satisfying the aforesaid trust shall stand seized in said trustee and his heirs and assigns, to and for the sole use, benefit, and behoof said Hertzog, and his heirs and assigns, forever. Witness our hands and seals the day and year first herein written.

JOSEPH HERTZOG. [SEAL.]
R. WASH. [SEAL.]

Signed, sealed, and delivered in presence of—
R. WASH.
JOHN K. WALKER.

STATE OF MISSOURI,
County of St. Louis, ss:

This day personally appeared before me, the clerk of the circuit court for St. Louis County, Robert Wash, one of the subscribing witnesses to the foregoing trust-deed, and known to me to be such witness, and being duly sworn, upon his oath, says that he saw the said Joseph Hertzog sign and seal the foregoing deed, and that he, the said Hertzog, then and there acknowledged the same for his act and deed, hand and seal for the
173 purposes therein mentioned; and said deponent further says that he knows the said Joseph Hertzog, and that he is the same person who executed said deed.

Given under my hand and seal of office at St. Louis, November 18th, 1822.

[SEAL.] ARCHIBALD GAMBLE, *Clerk.*

Recorded Nov. 18, 1822.

ARCHIBALD GAMBLE, *Clerk.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned recorder in and for the county aforesaid, do hereby certify that the foregoing is a true and correct copy of a deed from Joseph Hertzog to R. Wash, as also of the acknowledgment thereof, and of the date of recording the same, as the same remains of record in my office in book L, page 191.

Witness my hand and official seal this 3rd day of May, 1863.

[SEAL.] A. C. BEMONDY,
Recorder,
Pr. J. CONRAD, *D'y.*

[U. S. rev. stamp, 10 cents.]

174 Thirteenth. Copy of deed from Robert Wash, trustee, to P. Chouteau, dated Nov. 29, 1824, as follows:

Deed of B. Wash, trustee, to P. Chouteau, Nov. 29, 1824.

This deed made and concluded between Robert Wash, trustee of Joseph Hertzog, late of the city and county of St. Louis, of the one part, and Peter Chouteau, junior, of the same place, of the other part, witnesseth:

That said Robert Wash, trustee as aforesaid, and by virtue of the power and authority in him vested by said Joseph Hertzog, by a certain deed executed bearing date the twenty-sixth day of October, in the year 1822, and duly recorded in the office of the recorder of St. Louis County, reference being had thereto will more fully and at large appear, as also for and in consideration of the sum of one hundred and twenty-eight dollars, current money of the United States, to him, said Robert Wash, well and truly paid, the receipt whereof is hereby acknowledged, hath sold, assigned, released, and confirmed, and by these presents doth sell, assign, release, and
175 confirm unto said Peter Chouteau, junior, and his heirs and assigns, forever, all the right, title, interest, property, and estate which the said Joseph Hertzog had at the date of the deed of trust aforesaid, in and to the following-described tract of land, situate, lying, and being in the county of St. Louis aforesaid; that is to say, sixty-four acres, English measure, part and parcel of a tract of six hundred and forty acres located by the late Christian Wilt, deceased, as assignee of the certificate in the name of James Y. O'Carroll, which said location is in township No. 45, range 7 east, the particulars of the said entry of location, as the boundaries thereof may be seen by reference to the books of the surveyor of public lands for Missouri, Illinois, and Arkansas, and which said tract and location has been duly conveyed by the legal representatives of said Christian Wilt to said Joseph Hertzog, as may appear by reference to record of the same in the office of St. Louis County, and by said Joseph Hertzog
176 conveyed to said Robert Wash in said deed of trust above mentioned; said sixty-four acres are to be taken and laid off of the western side of said location and tract of six hundred and forty acres adjoining Crange square confirmed to the late Charles Gratiot, deceased, the line to commence where the southwestern line of Susannah Dubrail's confirmation of eighty arpens, No. 833, intersects the eastern line of said league square, and then to run southwardly with the last-mentioned line to the line of the Barren des Noyer's fields, and thence eastwardly and northwardly for quantity, to be surveyed as near in a square as may be from said described bound'ries, as may appear by reference to the plat of township No. 45 aforesaid, in said surveyor's office.

To have and to hold said granted and described premises, with all and singular the appurtenances thereunto in anywise belonging, unto him, the said Peter Chouteau, junior, and his heirs and assigns forever.

177 In witness whereof I, the said Robert Wash, have hereunto set my hand and affixed my seal, at St. Louis, this twenty-seventh day of November, A. D. 1824.

R. WASH. [SEAL.]

Signed, sealed, and delivered in presence of—
CHARLES S. HEMPSTEAD.
JAMES R. PECK.

STATE OF MISSOURI,
County of St. Louis, to wit:

Personally appeared before me this day, the undersigned, a justice of the peace in and for the county aforesaid, the above-named Robert Wash, (personally well known to me), who acknowledged that he sealed and the above deed freely and voluntarily for the purposes therein expressed.

Certified and taken by me this 30th day of November, 1824.

P. WALSH, *J. P.*

Recorded December 13th, 1824.

ARCHIBALD GAMBLE, *Clerk.*

STATE OF MISSOURI,
County of St. Louis, ss:

178 I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Joseph Hertzog's trustee to P. Chouteau, junior, the certificate of acknowledgment and the date of recording as fully as the same remains of record in my office in book M, p. 172.

Witness my hand and official seal this 2nd day of May 1863.

[SEAL.] A. C. BEMONDY, *Recorder*,
P'r J. CONRAD, *D'y.*

[U. S. rev. stamp for 10 cents.]

To the reading of this deed in evidence Charles Gibson, defendant, objected, that the same was void, incompetent, and irrelevant. The court overruled the objection, and defendant excepted thereto at the time.

Fourteenth. Copy of deed from J. K. Walker, sheriff, to H. Clay, dated May 17th, 1825, as follows:

Deed from J. K. Walker, sh'ff, to H. Clay, May 17, 1825.

To all whom these presents shall come I, John K. Walker, sheriff of the county of St. Louis, in the State of Missouri, send greeting:

Whereas a writ of execution issued from the clerk's office of the circuit court within and for the county of St. Louis, returnable to
179 the February term of said court, in the year one thousand eight hundred and twenty-five, in favor of Henry Clay, executor of James Morrison, deceased, against Joseph Hertzog, which said execution became returnable to the March term of said court in the year aforesaid, pursuant to an act of the last general assembly entitled "An act to establish judicial districts and circuits, and prescribing the time and place of holding courts," approved Feb'y 5, 1825, and which execution is in the words and figures following, to wit:

STATE OF MISSOURI,
County of St. Louis, ss:

To the sheriff of St. Louis County, greeting:

Whereas Henry Clay, executor of James Morrison, deceased, at our cir-

cuit court, before our judge thereof, hath recovered against Joseph Hertzog the sum of two thousand two hundred and eighty-six dollars for his debt, and also the further sum of one hundred and forty-seven dollars and forty-five cents for his damages by him sustained by reason of the
180 detention of said debt, and also his costs and charges by him about his suit in that behalf expended, which to the said H. Clay, executor of James Morrison, deceased, were adjudged, as appears to us of record: These are, therefore to command you that of the goods and chattels, lands and tenements of the said Joseph Hertzog, in your bailiwick, you cause to be made the aforesaid debt, damages, and costs, and that you have the same before the judge of our said on the first Monday of February next, to render to the said Henry Clay, executor as aforesaid, the debt, damages, and costs aforesaid. And for want of sufficient goods and chattels, lands and tenements whereon to levy and make the same, we command you to take the said Joseph Hertzog, if he be found in your bailiwick, and him safely keep so that you may have his body before the said judge on the said first Monday of February, to satisfy the said Henry Clay, exect'r as aforesaid, of the aforesaid debt, damages, and costs,
181 and that you certify to our said judge how you execute this writ, and have you then there this writ.

Witness, Archibald Gamble, clerk of our said court, at St. Louis, this sixteenth day of December, in the year of our Lord one thousand eight hundred and twenty-four.

[SEAL.] ARCHIBALD GAMBLE, *Clerk.*

Which said execution being directed to the sheriff of the county of St. Louis, aforesaid, and to me, said sheriff, delivered, by virtue of which said execution I did, on the first day of January, in the year one thousand eight hundred and twenty-five, levy upon and seize all the right, title, interest, estate, and property of the said Joseph Hertzog, in and to the following-described real estate:

First. A lot of ground in the city of St. Louis, containing thirty feet front, by one hundred and fifty feet deep; bounded east by Main street, south by lot of Louis Letournius, north and west by a lot of William C. Carr,

Second. A lot of ground, with the buildings, &c., thereon, in the
182 city of St. Louis, aforesaid, containing sixty feet front by one hundred and fifteen feet deep (more or less); bounded on the east by Main street, which separates it from a lot of William C. Carr, on the south by a lot of Benoit, west by a lot of Robiaoux, and north by a lot of Michel Ledrevotte, on which said lot is a soap factory erected by Joseph Henderson.

Third. The undivided half of a tract of land containing two hundred and four acres, situated in the township of St. Ferdinand, originally granted to Lawrence Huff; bounded on the north by land formerly owned by William Massie, on the south by land of A. Soulard, acquired by Christian Wilt of Simon Brewster by deed dated May 12th, 1818.

Fourthly. A tract or parcel of land lying about three and a half miles southwest of the city of St. Louis, in prairie called Barrie de Noyer, containing six hundred and forty acres (more or less), located by virtue of a New Madrid certifiate, No. 150, dated 30th November, 1815,
183 granted to James Y. O'Carroll or his legal representatives.

And the said property being advertised as the law directs, by fixing advertisements in six of the most public places in my county, at least twenty days before the day of sale, which said advertisements were in the words and figures following, to wit:

"*Sheriff's sale.*

"By virtue of a writ of execution to me directed from the circuit court in favor of Henry Clay, ex'r of James Morrison, against Joseph Hertzog, I have levied upon and will sell for cash to the highest bidder, at the court-house door of St. Louis, on Thursday, the 10th day of February next, between the hours of 9 and 4, all the right, title, claim, interest, estate, and property of said defendant in and to the following-described real estate, to wit:

"1st. A lot of ground in St. Louis, containing thirty feet front by 150 feet deep; bounded east by Main street, south by a lot of Louis Letournois, north and west by a lot of Wm. C. Carr.

"2nd. A lot of ground, with the buildings, &c., thereon, con-
184 taining 60 feet front by 115 feet deep (more or less); bounded east by Main street, south by a lot of Benoit, west by a lot of Robedeaux, and north by a lot of Michael Laderotte.

"3rd. The undivided half of a tract of land containing 204 acres, situated in the township of St. Ferdinand, being the same tract of land originally granted to Lawrence Huff.

"4th. A tract of land containing 640 acres, situated in the Barrie De Voyer Prairie, located by virtue of a New Madrid certificate, No. 150, and bearing date Nov. 30, 1815.

"St. Louis, January 1, 1825.

"JOHN K. WALKER, *Sheriff.*"

And whereas the act of assembly above referred to provided that all property advertised for sale at the February term of said court shall be sold on the same day of the March term that it would have been sold on at the February term if no such act had been passed, by virtue of which said execution and advertisements and act of assembly above referred to I did,
on the 31st day of March, in the year eighteen hundred and twenty-
185 five, it being the same day of the March term of said court that the above-described property was advertised for sale at the February term, expose to sale, agreeably to the advertisement thereof and the act of assembly above referred to, at the court-house door in the city of St. Louis, during the sitting of the circuit court of said county, for ready cash, all the right, title, estate, and property of him, the said Joseph Hertzog, of, in, and to the above-described property, together with all and singular the building and improvements thereon; and Henry Clay, executor of James Morrison, deceased, being the highest and last bidder for the above-described town lot at the price and sum of five hundred dollars, and for the tract of land thirdly above described at the price and sum of two hundred and fifty dollars, and for the tract of land fourthly and lastly described at the price and sum of four hundred and fifty dollars, making in
all the sum of one thousand and two hundred dollars, the same was
186 struck of and sold to him, the said Henry Clay, the executor of James Morrison as aforesaid:

Now, therefore, know ye that I, John K. Walker, sheriff as aforesaid, for and in consideration of the sum of one thousand two hundred dollars, to me in hand paid by the said Henry Clay, executor as aforesaid, the receipt whereof I do hereby acknowledge, and by virtue of the authority in me vested by law, I do hereby transfer and assign to him, the said Henry Clay, executor as aforesaid, all the right, title, interest, estate, and property of him, the said Joseph Hertzog, of, in, and to the above secondly-described town lot and tracts of land that I might sell agreeably to law, as sheriff aforesaid, by virtue of the aforesaid execution and advertisement and act of assembly above referred to: To have and to hold to him, the said Henry Clay, executor as aforesaid, and to his heirs and assigns forever.

In witness whereof I, John K. Walker, sheriff of the county of
187 St. Louis, have hereunto set my hand and seal this seventeenth day of May, in the year of our Lord one thousand, eight hundred and twenty-five, and of the Independence of the United States the forty-ninth.

JOHN K. WALKER, *Sheriff.* [SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on the seventeenth day of May, in the year one thousand eight hundred and twenty-five, John K. Walker, sheriff of the county of St. Louis, personally appeared in open court and acknowledged the execution of the within deed from him as sheriff to Henry Clay (executor of James Morrison, deceased), therein named, which said acknowledgment is entered on the records of the court of that day.

Given under my hand and seal of office, at St. Louis, this seventeenth day of May, in the year one thousand eight hundred and twenty-five.

[SEAL.] ARCHIBALD GAMBLE, *Clerk.*

188 NOTE.—The words "of land" in the 5th line from the bottom of the preceding page are interlined in the original.

Recorded 7th June, 1825.

ARCHIBALD GAMBLE,
Recorder.

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Jos. Hertzog, by sheriff, to Henry Clay, ex'r of James Morrison, dec'd, the certificate of acknowledgment, and the date of recording, as fully as the same remains of record in my office in book M, page 303.

Witness my hand and official seal this 4th day of May, 1863.

[SEAL.] A. C. BERNOUDY, *Recorder,*
P'r J. CONRAD, *D'y.*

[U. S. stamp for ten cents.]

To the reading of this deed in evidence Charles Gibson, defendant, objected that the same was void, incompetent, and irrelevant. The
189 court overruled the objection and defendant excepted thereto at the time.

Fifteenth: Copy of deed from H. Clay and wife to Ann McRee et al., dated October 11, 1839, as follows:

Deed from H. Clay & wife to Ann McRee et al., Oct. 11, 1839.

This deed, made this 11th day of October, in the year of our Lord one thousand eight hundred and thirty-nine, witnesseth:

That Henry Clay and Lucretia, his wife, of Lexington, in the State of Kentucky, for and in consideration of the sum of five hundred dollars heretofore paid to the said Henry Clay by William McRee, of the city of St. Louis, in the State of Missouri, now deceased, the receipt of which sum is hereby acknowledged, has bargained, sold, and conveyed, and by these presents do bargain, sell, and convey, to Ann McRee, James F. McRee, and Samuel McRee, heirs and representatives of the said William McRee, deceased, all that certain tract or parcel of land situate in the county of St. Louis and State of Missouri lying about three and a half miles southwest of the city of St. Louis, containing six hundred and
190 forty acres, more or less, located by virtue of a New Madrid certificate, number one hundred and fifty, issued to James Y. O'Carroll, or his legal representatives, being the same tract of land acquired by the said Henry Clay at sheriff's sale, as the property of Joseph Hertzog, as will appear by reference to the sheriff's deed to the said Henry Clay, dated the seventeenth day of May, in the year eighteen hundred and twenty-five, and recorded in the recorder's office of St. Louis County on the seventh day of June, in the year eighteen hundred and twenty-five.

To have and to hold the said tract of land above described unto the said Ann McRee, James F. McRee, and Samuel McRee, as heirs-at-law of said William McRee, deceased, in the shares and proportions in which they are entitled by law to the estate of the said deceased in the State of Missouri, and to their heirs forever. And the said Henry Clay warrants the title to the said tract of land against all persons claiming the same under him, but against no other claim or person whatever.

191 In witness whereof the said Henry Clay and wife have hereto set their hands and seals the date above written.

H. CLAY. [SEAL.]
LUCRETIA CLAY. [SEAL.]

"And to their heirs forever" interlined before signing.

COMMONWEALTH OF KENTUCKY,
County of Fayette:

Be it remembered that on this day personally appeared before the undersigned, clerk of the county court of Fayette County, Henry Clay and Lucretia, his wife, who are both personally known to me to be the persons whose names *or* subscribed to the foregoing instrument of writing as parties thereto, and severally acknowledged the same to be their act and deed for the purposes therein mentioned; and she, the said Lucretia Clay, being by me made acquainted with the contents of said instrument of writing, acknowledged, on examination apart from her said husband, that she executed the same and relinquished her dower in the real estate therein mentioned freely, without compulsion or undue influence of her said husband.

192 In testimony whereof I have hereunto set my hand and seal of said county court, at Lexington, this eleventh day of October, in the year eighteen hundred and thirty-nine.

Fee, $8.50—pd.

J. C. RODES, *Clk F. C. C.*

Filed for record June 2nd, 1840, and recorded June 24th, 1840.

JNO. RULAND, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from H. Clay to Ann McRee et al., the certificate of acknowledgment, and the dates of filing and recording, as the same remains of record in my office in book M No. 2, page 260.

Witness my hand and official seal, at office, this the 23rd day of Nov'b'r, 1863.

A. C. BERNOUDY, *Recorder,*
P'r J. CONRAD, *D'y.*

[U. S. rev. stamp for 5 cents.]

Sixteenth. Copy of deed from Ann McRee et al. to Sam'l McRee, dated July 4th, 1836, as follows:

193

Deed from Ann McRee et al. to Sam'l McRee, July 4, 1836.

This indenture, made this 4th day of July, in the year of our Lord one thousand eight hundred and thirty-six, between Ann McRee and James F. McRee and Mary A. McRee, his wife, of the county of New Hanover, in the State of North Carolina, of the one part, and Samuel McRee, at present of the county of Saint Louis, and State of Missouri, witnesseth:

That whereas William McRee, late of the State of Missouri, died intestate, seized and possessed of one or more tracts or parcels of land in the said State of Missouri; and whereas the said Ann McRee, as the mother, and James F. McRee, as one of the brothers of the said William McRee, are, by the laws of the said State of Missouri, two of the heirs-at-law of the said William, and as such entitled each to one undivided third part of the lands of which the said William died seized and possessed as aforesaid: Now, therefore, the said Ann McRee, James F. McRee, Mary A. McRee, the wife of the said James F. McRee, for and in consideration of

194 the sum of sixteen hundred dollars to them in hand paid by the said Samuel McRee, at and before the sealing and delivery of these presents, the receipt whereof they do hereby acknowledge, and are therewith fully satisfied, content, and paid, have granted, bargained, sold, aliened, enfoeffed, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, convey, and confirm, unto the said Samuel McRee and his heirs all the real estate situate in the State of Missouri of which the said William McRee died seized and possessed as aforesaid, and more particularly a certain tract or parcel of land situated, lying, and being near the town of St. Louis, bordering on the commons of said town, in the State of Missouri, said to contain seven hundred arpens, more or less, hereby remising and releasing all and whatsoever right, title, interest, and property, claim, or demand which the said Ann McRee and James F. McRee,

or either of them, have or may have of, in, and to the said lands
195 as heirs-at-law aforesaid. To have and to hold the said lands, together with all and singular the rights, privileges, and appurtenances to the same belonging or in any wise appertaining, and all the right, title, interest, and property, claim, and demand of the said Ann and James of, in, and to the same, to the said Samuel McRee, his heirs and assigns, forever. And the said Ann McRee and James F. McRee, for themselves and their and each of their heirs and executors, do covenant and agree with the said Samuel McRee, his heirs and assigns, that they will forever warrant and defend the said bargained premises to the said Samuel McRee, his heirs and assigns, against the lawful claims of all and every person claiming title to the same by, through, or under them.

In witness whereof the said Ann McRee, James F. McRee, and Mary A. McRee have hereunto set their hands and seals this 4th day of July, in the year of our Lord eighteen hundred and thirty-six.

196 ANN McREE. [SEAL.]
MARY McREE. [SEAL.]
JAMES F. McREE. [SEAL.]

Signed, sealed, and delivered in presence of—
WM. A. WRIGHT.

STATE OF NORTH CAROLINA,
County of New Hanover:

Be it remembered that this day personally appeared before the undersigned, clerk of the superior court of law for the county of New Hanover as aforesaid, Ann McRee, James F. McRee, and Mary A. McRee, his wife, all of whom are personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as parties thereto, who severally subscribed the said instrument of writing in my presence and acknowledged the same to be their act and deed for the purposes therein expressed. She, the said Mary A. McRee, wife of the said James F. McRee, being by me first made acquainted with the contents of said conveyance, *and* acknowledged, on an examination apart from her
197 husband, that she executed the same freely and without compulsion or undue influence of her said husband.

In testimony of all which I have hereunto set my hand and affixed the seal of the said court, at office, in Wilmington, this twelfth day of July, in the year of our Lord one thousand eight hundred and thirty-six.

[SEAL.] WM. A. WRIGHT, *Clerk.*

Filed for record 29th November, 1836.
Recorded 5th January, 1837.

JNO. RULAND, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Ann McRee et al. to Samuel McRee, the cer-

tificate of acknowledgment, and the dates of filing and recording, as the same remains of record in my office in book Y, page 491.

Witness my hand and official seal this 23rd day of Nov., 1863.

[SEAL.] A. C. BERNOUDY, *Recorder*,
P'r J. CONRAD, *D'y*.

[U. S. rev. stamp for 5 cents.]

198 Seventeenth. Copy of deed from S. McRee and wife to P. Chouteau, acknowledged 31 October, 1839, as follows:

Deed from S. McRee & wife to P. Chouteau, ack. Oct. 31, 1839.

This deed, made this thirtieth day of August, in the year eighteen hundred and thirty-eight, witnesseth:

That Samuel McRee, of the Army of the United States, and Mary McRee, his wife, for and in consideration of the sum of one hundred and fifty dollars to them in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, released, quitclaimed, and conveyed, and by these presents do bargain, sell, release, quitclaim, and convey, unto Pierre Chouteau, junior, of the city of St. Louis, and his heirs, the following-described tract or parcel of land, situate, lying, and being in the county of St. Louis, and State of Missouri, bounded as follows, to wit: Beginning on the eastern line of the league square granted and confirmed to Charles Gratiot, at a point where the southern line of the land confirmed to Susan
199 Dubriel intersects the said line of the league square; thence with the line of the said league square south eight degrees forty minutes west forty-eight chains to a point in said line corner of Susan Janette's claims; thence south eighty-three degrees thirty minutes east thirteen chains sixty-four links to a post; thence north seventy-five degrees west thirteen chains seventy links to the beginning, containing the quantity of sixty-four acres, being part of the tract located under a New Madrid certificate issued to James Y. O'Carroll or his legal representatives, to be taken off the western end of said tract, and is the same parcel of land conveyed to said Pierre Chouteau, junior, by Robert Wash, as trustee of Joseph Hertzog, by deed recorded in the recorder's office of St. Louis County, in book M, page 172 and following.

To have and to hold the above-described tract of land to the said Pierre Chouteau, junior, and his heirs forever.

In testimony whereof the said Samuel McRee and wife have hereto set their hands and seals the date above written.

200 SAMUEL McREE. [SEAL.]
MARY McREE. [SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this thirty-first day of October, in the year of our Lord eighteen hundred and thirty-nine, before me, a justice of the peace within and for the county aforesaid, appeared Samuel McRee and Mary, his wife, who are both personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and severally acknowledged the same to be

their act and deed for the purposes therein mentioned. She, the said Mary, being made acquainted with the contents of said conveyance, acknowledged, on an examination apart from her husband, that she executed the same and relinquished her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband.

Taken and certified the day and year last aforesaid.

J. WALSH, *Justice.*

201 Filed for record November 8th, 1839, and recorded November 11th, 1839.

JOHN RULAND, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder in and for the county aforesaid, certify that the foregoing is a true and correct copy of a deed from Samuel McRee to Pierre Chouteau, jr., as also of the acknowledgment thereof, and of the date of filing, and that of recording the same, as the same remain of record in my office in book K, page 12.

[SEAL.] A. C. BERNOUDY, *Recorder.*
Pr. J. CONRAD, *D'y.*

[U. S. stamp.]

Eighteenth. Copy of record of chancery suit of Hertzog vs. Hempstead et al., as follows:

RECORD OF CHANCERY SUIT OF HERTZOG VS. HEMPSTEAD & AL.

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that heretofore, to wit, on the day of , A. D. 18 , there was filed in the office of the circuit court of St. Louis County a bill in chancery, which was in the words and figures following, to wit:

202 *Bill in chancery.*

To the honorable the circuit court in and for the county of St. Louis, sitting as a court of chancery:

Complaining unto your honorable court, your orator, Joseph Hertzog, at present of the town and county of Saint Louis, and within the jurisdiction of this court, sheweth, that in the month of June, in the year one thousand eight hundred and eleven, your orator, then residing in the city of Philadelphia, agreed with Christian Wiltz, his nephew, and who he had raised in his store, then residing at St. Louis, but since deceased, to form a partnership in the trade and business of selling merchandise in the then Louisiana Territory, and also in whatever other business they might choose to pursue in said Territory; the terms of which partnership were these: Your said orator was to furnish all the capital, purchase the goods at Philadelphia, deliver here at the East, and attend to the transportation of the same, and in general to perform all things which might be
203 necessary and proper as a partner residing at the eastward; the

said Christian Wilt, on his part, was to reside at and superintend all the business of the concern at St. Louis and elsewhere in said Territory, for which he was to have and receive one-third of the profits and suffer one-third of the losses.

That, in pursuance of this understanding and agreement, it was further consented by your orator that the name and style of the firm might be as the said Christian Wilt might deem fit, who thereupon adopted the style of "Christian Wilt," under which name and firm they commenced business at St. Louis and elsewhere in the now State of Missouri, and continued with much success until the fall of 1818, when the said parties agreed to take into their said firm at St. Louis Andrew Wilt, the brother of said Christian Wilt.

And your orator further sheweth that during the partnership of said Christian Wilt aforesaid he, said Wilt, with the goods and part-
204 nership funds, purchased *a* considerable real estate for an' on account of said firm, *and* the books of said firm will show; the title deeds to which the said Christian Wilt always took in the name of said firm "Christian Wilt;" that in this way he purchased, amongst considerable other real estate situate in Missouri and Illinois, the following property, situate, lying, and being in the said county of Saint Louis, to wit:

One certain lot, piece, or parcel of ground in the town of St. Louis, containing one hundred and twenty feet, French measure, in front, by one hundred and fifty feet, more or less, in depth, bounded on the west and in front by first Main street, north by a cross street which separates it from lot of Andre Laudreville, east by the river Mississippi, and south by the lot now occupied by Gabriel Paul, it being the same lot purchased by said Wilt in part from Edward Hempstead and wife by deed dated Aug. 1, 1811, and recorded in the office of the recorder of St. Louis County,
205 in book P, page 457 and following, and the other part from Pierre Chouteau, sen'r, and wife, by deed dated September 2nd, 1812, and recorded in the same office, in book C, page 66 and following, all which may *be* more fully *and fully* appear by reference to said deeds and records; upon which said lot the said Christian Wilt erected, for the use and benefit of said concern, and out of its funds, a large brick store, dwelling-house, stable, out-houses, and also a factory for the manufacture of white and red lead, and other adjoining and necessary buildings attached to said factory.

Also, one other lot, part, or piece of ground, situate in the same town, containing the quantity of sixty feet front, running back one hundred and fifteen feet, bounded in front by First Main street, north by the lot of Michel Rollette, south by the lot of Francois M. Benoit, dec'd, and west by lot of Joseph and Francis Robedeux, on which said lot there is a brick house and candle and soap factory, and which was purchased at
206 sheriff's sale as Joseph Henderson's property, as may fully appear by reference to the sheriff's deed for the same, recorded in *in* the office aforesaid, in book H, page 471 and following.

Also, one other lot or parcel of ground, situate in the same town, containing thirty feet front by one hundred and fifty feet deep, bounded in front and eastwardly by First Main street, south by a lot formerly owned by Louis Latourneau, north by lot now occupied by Thomas Forsythe, and west by lot of William C. Carr, being the same lot acquired by said

Wilt from Louis Latourneau and wife by deed dated June 16, 1816; deed recorded in same office, in book C, pages 515 and following.

Also, the undivided moiety or half part of a certain tract or parcel of land, situate, lying, and being in the same county, containing two hundred and four acres, bounded on the north by lands formerly owned by Capt. Wm. Murphy, south by land of Anthony Soulard, as will more fully and at large appear by reference to the deed of conveyance for the same
207 from Simon Brenter and wife, dated May 12, 1818, and recorded in the aforesaid office, book G, pages 302 and following. The other part of said belongs to Col. James Morrison, of Lexington.

Also a certain other tract or parcel of land situate, lying, and being about three and a half miles southwest of the town of St. Louis, in the prairie called the "Barriere des Noyes," containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by the said Christian Wilt, by virtue of a certain New Madrid certificate, so called, the number whereof is 150, dated Nov. 30, 1815, in the name of James Y. O'Carroll or his legal representatives, all which will more fully appear by reference to said location in the office of the surveyor United States lands for Missouri, Illinois, and Arkansas, and to the deed of transfer for said certificate from James Tanner or the legal representatives of said James Y. O'Carroll to said Christian Wilt, dated in the year 1816, and recorded in the same office forSt. Louis County, book H, pages 237, '8, & '9,

208 And your orator further sheweth that the said partnership continued as aforesaid until the fall of 1818, when your orator agreed to advance for the said Andrew Wilt, since deceased, his share of capital stock, to wit, one-third, and the said Christian Wilt and your orator agreed that said Andrew should be taken in on a' equal third portion of the said firm of St. Louis, and that the whole effects, credits, and goods and stock in trade in the now State of Missouri of the said firm of Christian Wilt should form the stock of the new firm to be styled C. and A. Wilt & Co., which last firm continued until the unfortunate death of said Andrew Wilt and said Christian Wilt in the summer of 1819, during the existence of which said last-mentioned partnership they made no profits, and, on the contrary, lost much.

209 And your orator further sheweth that said Christian Wilt di'd without there having been any settlement of the accounts of the original firm, which had contracted some debts, most of which remain still unsettled; and your orator further sheweth that said firm of Christian Wilt has been re-established in that name since the death of said Andrew Wilt, inasmuch as said firm of C. and A. Wilt & Co. had made no profits, and as all of the capital stock of the share of said Andrew was advanced by your orator.

And your orator further sheweth that said Christian Wilt died intestate, leaving as his next of kin, only heir, and legal representative his infant son George Wilson Wilt, aged about 4 years, the wife of said Christian having died about four years previously; and your orator further states that Charles L. Hempstead (the brother-in-law of said Christian), then and at present of the said town and county of St. Louis, and whom he prays may be made defendant to this bill, administered on the estate of said Christian Wilt, deceased, and was also by the circuit court of

St. Louis County aforesaid duly appointed guardian to said George W. Wilt, who is now residing with his said guardian. 210

But now, so it is, may it please your honorable court, that it has become necessary to secure some debts and pay others of said firm of Christian Wilt by mortgaging and selling some of the real estate above described, which cannot be done legally so long as the titles to the said real estate is in the heir of the said Christian, from whom they cannot be divested save by the intervention of this honorable court.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the direct rules of the common law, and can*not* have adequate relief only in a court of equity, where matters of this and a like nature are properly cognizable. Therefore your orator prays that said Charles S. Hempstead, as administrator and guardian aforesaid, may answer hereto, and that you will on such answer order and decree that the said Hempstead, as guardian as aforesaid, do convey and transfer by deed all the real estate mentioned in this bill to your orator as surviving partner of the late firm of "Christian Wilt" for the purposes aforesaid. 211

And he prays.

JOSEPH HERTZOG,
Surv'g partner of C. Wilt & Co.

COUNTY OF ST. LOUIS, *set:*

Joseph Hertzog, the above-named complainant, being duly sworn, says that the facts stated in the foregoing bill of complaint are true.

JOSEPH HERTZOG,
Surv'g partn' of C. Wilt & Co.

Sworn to and subscribed before me, a justice of the peace in and for said county, this 3rd day of Sept., 1821.

THOS. MAGUIRE, *J. P.* [SEAL.]

And thereafter there was filed in said cause an answer of W. S. Hempstead, which is in words and figures following, to wit:

Answer.

The above-named Charles T. Hempstead, guardian as aforesaid, for answer to so much of the foregoing bill of complaint as is material, says that he admits the facts stated in the foregoing bill are true to the best of his information and belief, and can urge no reason why the prayer of said complainant should not be granted, if this honorable court shall think proper so to do, &c. 212

W. S. HEMPSTEAD,
Guardian, &c., as aforesaid.

Sworn to and subscribed in open court this 4th day of Sept., 1821.

A. GAMBLE, *Clerk.*

And upon the hearing of said bill and answer the court made the following decree in said cause, to wit:

Decree.

JOSEPH HERTZOG, SURVIVING PARTNER OF the late firm of Christian Wilt,
vs.
CHARLES S. HEMPSTEAD, GUARDIAN OF GEORGE W. Wilt, infant heir of Christian Wilt, dec'd.

In the circuit court of St. Louis County, at August term, 1821, sitting as a court of chancery.

213 This cause coming on this present day to be heard, by consent of all parties, before the honorable circuit court in and for the said county of St. Louis sitting as a court of chancery, upon bill and answer, in presence of the parties concerned, the substance of the plaintiff's bill appearing to be that in the month of June, in the year one thousand eight hundred and eleven, the said plaintiff, then residing in the city of Philadelphia, agreed with Christian Wilt, his nephew, and who he had raised in his store, then residing in St. Louis, but since deceased, to form a partnership in the trade and business of selling merchandise in the Louisiana Territory, and also in whatever other business they might choose to pursue in said Territory, the terms of which partnership were these: the said plaintiff was to furnish all the capital, purchase the goods at Philadelphia and elsewhere at the eastward, attend to the transportation of the same, and in general to perform all things which might be necessary and proper as a partner residing at the eastward; the said Christian
214 Wilt on his part was to reside at and superintend all the business of the concern at St. Louis and elsewhere in said Territory, for which he was to have and receive one-third of the profits and suffer one-third of the losses. That in pursuance of this understanding and agreement it was further consented by the said plaintiff that the name and style of the firm might be as the said Christian Wilt might deem fit, who thereupon adopted the style of Christian Wilt, under which name and firm they commenced business at St. Louis and elsewhere in the now State of Missouri, and continued with much success until the fall of 1818, when the said partners agreed to take unto their said firm at St. Louis Andrew Wilt, the brother of said Christian Wilt; and the said plaintiff further stated that during the partnership of Christian Wilt aforesaid he, said Wilt, with the goods and partnership funds, purchased considerable real estate for and on account of said firm, as the books of said firm will
215 show; the title deeds to which the said Christian Wilt always took in the name of said firm "Christian Wilt." That in this way he purchased, amongst considerable other real estate situate in Missouri and Illinois, the following property, situate, lying, and being in the said county of Saint Louis, to wit:

A certain lot, piece, or parcel of ground in the town of St. Louis, containing one hundred and twenty feet, French measure, in front, by one hundred and fifty feet, more or less, in depth, bounded on the west and in front by First Main street, north by a cross street which separates it from a lot of Andre Laudreville, east by the river Mississippi, and south by the lot now occupied by Gabriel Paul, it being the same lot purchased by said Wilt in part from Edward Hempstead and wife, by deed dated Aug.

1, 1811, and recorded in the office of the recorder St. Louis County, in book C, page 457 and following, and the other part from Piere Chouteau, sen., and wife, by deed dated September 2nd, 1812, and recorded in the same office, book C, page 66 and following, all which may
216 more fully and *fully* appear by reference to said deeds and records. Upon which said lot the said Christian Wilt erected, for the use and benefit of said concern, and out of its funds, a large brick store, dwelling-house, stable, out-houses, and also a factory for the manufacture of white and red lead, and other adjoining and necessary buildings attached to said factory.

Also, one other lot, part, *and* piece of ground, situate in the same town, containing the quantity of sixty feet front, running back one hundred and fifteen feet, bounded in front by First Main street, north by the lot of Michael Rolbette, south by a lot of Francoise M. Benoit, dec., and *next* by a lot of Joseph and Francois Robidoux, in which said lot of his is a brick house and candle and soap factory, and which was purchased at sheriff's sale as Joseph Henderson's property, as may fully appear by reference to the sheriff's deed for the same, recorded in the office aforesaid, in book H, page 471 and following.

217 Also, one other lot or parcel of ground, situate in the same town, containing thirty feet front by one hundred and fifty feet deep, bounded in front and eastwardly by First Main street, south by a lot formerly owned by Louis Latourneau, north by lot now occupied by Thomas Forsythe, and west by lot of William C. Carr, being the same lot acquired by said Wilt from Louis Latourneau and wife by deed dated June 16, 1816, and recorded in same office, book E, page 515 and following.

Also, the undivided moiety or half part of a certain tract or parcel of land, situate, lying, and being in the same county, containing two hundred and four acres, bounded on the north by lands formerly owned by Cap. Wm. Massey, dec'd; south by lands of Anthony , as will more fully and at large appear by reference to the deed of conveyance for the same, from Simon Brusler and wife, dated May 12, 1818, and recorded in the aforesaid office, book G, page 312 and following; the other part of said belongs to Col. James Morrison, of Lexington.

Also, a certain other tract or parcel of land, situate, lying, and
218 being about three and a half miles southwest of the town of St. Louis, in the prairie called the "Barriere des Noyes," containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by the said Christian Wilt, by virtue of a certain New Madrid certificate, so called, the number whereof is 150, dated November 30th, 1815, in the name of James Y. O'Carroll or his legal representatives, all which will more fully appear by reference to said location in the office of the surveyor United States lands for Missouri, Illinois, and Arkansas, and to the deed of transfer for said certificate from James Tanner, as the legal representative of said James Y. O'Carroll to said Christian Wilt, dated in the year 1816, and recorded in the same office in St. Louis County, book H, pages 237, '8, and '9.

And the said plaintiff in his said bill also stated that the said partnership continued as aforesaid until the fall of 1818, when your orator
219 agreed to advance for the said Andrew Wilt, since deceased, his share of capital stock, to wit, one-third; and the said Christian

Wilt agreed that said Andrew should be taken in as equal *their* partner in the firm at St. Louis, and that the whole effects, credits, and goods and stock in trade in the now State of Missouri of the said firm of Christian Wilt should form the stock of the new firm, to be styled C. and A. Wilt & Co., which last firm continued until the unfortunate death of said Andrew Wilt and said Christian Wilt, in the summer of 1819, during the existance of which said last-mentioned partnership they made no profits, and on the contrary lost much; that said Christian Wilt died without there having been any settlements of the accounts of the original firm, which has contracted some debts, most of which remain still unsettled; that said firm of Christian Wilt has been re-established in that name since the death of said Andrew Wilt, inasmuch as the said firm of C. and A. Wilt & Co. had made no profits, and as all the capital stock of
220 the share of said Andrew was advanced; that said Christian Wilt died intestate, leaving as his next of kin and only heir and legal representative his infant son George Wilson Wilt, aged about 4 years, the wife of said Christian having died about four years previously; and your orator further states that Charles S. Hempstead (the brother-in-law of said Christian), then and at present of the said town and county of St. Louis, and whom he prays may be made defendant to this bill, administered on the estate of said Christian Wilt, deceased, and was also by the county court of St. Louis County aforesaid duly appointed guardian to said George W. Wilt, who is now residing with his said guardian.

Wherefore the said plaintiff prayed the said honorable court that as it had become necessary to secure some debts and pay others of said firm of Christian Wilt by mortgaging and selling some of the real estate above described, which cannot be done legally, so long as the titles to said
221 estate is in the heir of said Christian, from whom they cannot be divested save by the intervention of this honorable court; and said Charles S. Hempstein, as administrator and guardian aforesaid, may answer hereto, and that said court would on such answer order and decree that the said Hempstead, guardian as aforesaid, do convey and transfer by deed all the estate mentioned in this bill to your said orator as surviving partner of the late firm of Christian Wilt, for the purpose aforesaid.

Whereunto the said Charles S. Hempstead, guardian as aforesaid, by *her* answer admits that the facts mentioned in the above-mentioned bill were true and justly stated, according to the best of his information and belief, and that he could urge nothing against said order and decree, and if the said court should deem meet and proper to make and order it; whereupon this court doth think fit and so order and decree; and it is accordingly ordered and adjudged that said Charles S. Hempstead,
222 as guardian of the said George Wilson Wilt, infant and sole heir of said Christian Wilt, dec'd, the above-described several pleas and parcels of real estate described in said bill, do convey and transfer the same to said Joseph Hertzog, as surviving partner of the said firm of Christian Wilt, and for the use of said firm; and that Hempstead, as guardian as aforesaid, do execute and deliver the proper and necessary deed or deeds for the same, and that said plaintiff pay all costs and charges in this suit, &c.

STATE OF MISSOURI,
County of St. Louis, ss:

I, J. Fred. Thornton, clerk of the circuit court of St. Louis County, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain on file and of record in my office.

223 In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 24 day of February, A. D. 1875.

[SEAL.] J. FRED. THORNTON, *Clerk.*

To the reading of this transcript the defendant objected that the same was void, incompetent, and irrelevant. The court overruled the objection and the defendant excepted thereto at the time.

Nineteenth. Copy of deed from Hempstead, guardian of Wilt, &c., to Hertzog, dated September 10, 1821, as follows:

Deed from Hempstead, guardian, &c., to Hertzog, Sept. 10, 1821.

This indenture, made this tenth day of September, in the year one thousand eight hundred and twenty-one, between Charles S. Hempstead, guardian of George Wilson Wilt, infant son and only heir of the late Christian Wilt, deceased, of the town and county of St. Louis, of the first part, and Joseph Hertzog, surviving partner of the late firm of Christian

224 Wilt, deceased, of the second part, witnesseth:

That whereas said Joseph Hertzog, surviving partner as aforesaid, did file his bill in the St. Louis circuit court, setting as a court of chancery, to cause to be conveyed to him, said party of the second part, as surviving partner as aforesaid, by the said Charles S. Hempstead, as guardian as aforesaid, certain real estate, situate in the county aforesaid, which had been purchased for and on account of said firm by the said Christian Wilt; and whereas the said circuit court, at the present August term thereof, upon the bill aforesaid and the answer of said guardian, did order and decree that the *the* real estate hereinafter particularly described should be transferred and assigned by the said guardian, party of the first part, to the said Joseph Hertzog, as surviving partner of the aforesaid firm, and to and for the sole use and benefit of said firm, all which

225 will and may more fully and at large appear by the said proceedings and decree now remaining of record in the said circuit court:

Now, know ye that I, the said Charles S. Hempstead, as guardian of said George Wilson Wilt, infant son and heir aforesaid, in pursuance of and by virtue of the power and authority in me vested by said decree, do hereby transfer, release, assign, and set over to said Joseph Hertzog, as surviving partner of said Christian Wilt, deceased, and to his assigns, the following real estate, situate, lying, and being in the county aforesaid and mentioned and described in said decree, to wit: All that certain lot or parcel of ground situate in the town of Saint Louis, containing the quantity of one hundred and fifty feet, more or less, in depth, bounded in front and westwardly by First Main street, which separates it from the lot formerly of Emilien Yosty; northwardly by a cross street, which

226 separates it from the lot of Andre Laudreville; south by the

lot of Gabriel Paul, and eastwardly by the river Mississippi, on which said lot there is a large brick store and dwelling-house, stone factory, and other buildings, and which is the same lot acquired by the said Christian Wilt from Edward Hempstead, Pierre Chouteau, sen'r, and Mad'me V. Hebert, as may more fully and at large appear by reference to the deed from said Edward Hempstead and wife, dated August 1, 1811, and recorded in the office of the recorder of St. Louis County aforesaid, book 6, pages 573 and following. Also, all that certain other lot and piece of ground, situate, lying, and being in the said town of St. Louis, containing the quantity of sixty feet front by one hundred and fifteen feet, more or less, in depth; bounded eastwardly and in front by said First Main street; northwardly by the lot of Michel Rolette; westwardly the lot now or formerly of Francis and Joseph Robidoux;
227 and southwardly by the lot of the estate of Francois M. Benoit, dec'd, upon which said lot is a brick dwelling-house and soap and candle factory, it being formerly the property of Joseph Henderson, and as such purchased by said Christian Wilt at sheriff's sale, all which may more fully appear by reference to the deed therefor, recorded in the office aforesaid, book H, pages 471 and following. Also, all that certain other *part* or parcel of ground, situate, lying, and being in the town of Saint Louis aforesaid, containing the quantity of thirty feet front by one hundred and fifty feet deep, bounded eastwardly and in front by said First Main street, southwardly by the lot formerly of Louis Latourneau, northwardly by the lot now of Thomas Forsyth, and westwardly by ground formerly of William C. Carr, and which lot was purchased by said Christian Wilt from Louis Latourneau, by deed dated June 19, 1816, and recorded in the same office, book E, page 515 and following. Also, the one equal
228 undivided moiety or half of a certain tract or parcel of land situate and lying in the county aforesaid, containing the quantity of two hundred and four acres, bounded northwardly by lands of General De Bissell and the late William Massey, and southwardly by the lands of Anthony Soulard, it being the same tract of land purchased by said Christian Wilt from Simon Bruster by deed dated May 12, 1818, and recorded in the same office, book G, pages 302 and following, as may more fully and at large appear. Also, all that certain tract or parcel of land, situate, lying, and being in the same county about three and a half miles southwest of the town of Saint Louis, containing the quantity of six hundred and forty acres; for the boundaries thereof reference is made to the location thereof by Jos. C. Brown, deputy surveyor for said Christian Wilt, in the office of the United States surveyor for Missouri and Illinois, the same having been located by virtue of a certain certificate commonly a New
229 Madrid claim, the number whereof was 150, and dated November 30, 1815, granted in favor of James I. O'Carroll and his legal representatives, which said certificate was sold and conveyed to said Christian Wilt by James Tanner by deed dated in the year 1816, and recorded in the same office, book H, pages 237, '8, and '9, all which will more fully and at large appear by reference to said location certificate and deed aforesaid. To have and to hold the above-described premises, with all and singular the rights, privileges, and appurtenances thereunto in anywise belonging unto him, said Joseph Hertzog, as surviving partner of the late firm of Christian Wilt, and to his only and proper use, benefit, and behoof, as surviving partner as aforesaid, and his heirs and assigns forever.

And it is further declared, covenanted, and agreed by and between the said Charles S. Hempstead, as guardian as aforesaid, and the said Joseph Hertzog, and his heirs, executors, administrators, and assigns, that
230 the said several premises hereinbefore conveyed and described are only to be disposed of and sol' or bargained among, for, and on account of the said firm of Christian Wilt, either in payme' (———) security of or discharge of its debts, or in closing its concerns according to the *the* true intent (———) meaning of the bill and proceedings in, and order and decree of, said court as aforesaid and *n* (*m*) is herein again referred to for that purpose.

In testimony whereof I, the said Charles (———) Hempstead, as guardian as aforesaid, have hereto set my hand and affixed my seal, at St. (———) the day and year first hereinbefore written. (The words "by said decree" interlined between the 23rd and 24th lines of the first page and approved of before signing.)

[SEAL.] CH'S S. HEMPSTEAD,
Guardian of G. W. Wilt.

Signed, sealed, and delivered in presence of—

STATE OF MISSOURI,
County of St. Louis, ss:

231 This day personally appeared before me the clerk of the circuit court for the county of St. Louis, the above-named Charles S. Hempstead, and acknowledged the above and foregoing deed or instrument in writing by him signed as guardian to be his act and deed, hand and seal, for the purposes therein mentioned.

Given under my hand and seal of office, at St. Louis, this 13th day of September, 1821. Recorded this 13th day of September, 1821.

[SEAL.] ARCHIBALD GAMBLE, *Clerk.*

NOTE BY RECORDER.—Words or parts of words marked thus (———) defaced in original record.

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Chas. S. Hempstead, guardian of Geo. W. Wilt, to Jos. Hertzog, the certificate of acknowledgment and the date of recording as fully as the same remains of record in my office in book K, page 316.

232 Witness my hand and official seal this 4th day of May, 1863.

[SEAL.] A. C. BERNOUDAY, *Recorder,*
P'r J. CONRAD, *D'y.*

[U. S. rev. stamp, 10 cents.]

To the reading of this paper defendant objected that the same was void, incompetent, and irrelevant. The court overruled the objection, and defendant excepted thereto at the time.

Twentieth. Transcript of the record of the chancery suit in the St. Louis

circuit court of Henry Clay vs. Joseph Hertzog, Christian Wilt, et al., commenced October 20, 1829, as follows:

TRANSCRIPT OF RECORD IN CHANCERY SUIT, H. CLAY VS. J. HERTZOG, HEIRS, &C.

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that heretofore, to wit, on the 20th day of October, A. D. 1829, there was filed in the office of the clerk of the circuit court of St. Louis County a bill of complaint in words and figures following, to wit:

Bill of complaint.

To the St. Louis circuit court, sitting as a court of chancery:

233 Humbly complaining, sheweth unto your honor, your orator, Henry Clay, of Kentucky, executor of James Morrison, deceased, that one Christian Wilt, then residing at the town of St. Louis, in the then Territory of Missouri, departed this life some time in the summer of the year eighteen hundred and nineteen, seized in fee and possessed of the following real property situate in St. Louis County, to wit: The undivided half of a tract of land, containing two hundred and four acres, bounded on the north by lands formerly owned by Capt. William Massey, south by lands of Anthony Soulard, acquired by said Christian Wilt from Simon Brewster and wife by deed dated May 12th, A. D. 1818; also another tract of land lying about three and a half miles southwest of the town of St. Louis, in the prairie called the "Barriere des Noyer," containing the quantity of six hundred and forty acres, more or less, it being a location by virtue of a New Madrid certificate numbered (150) one
234 hundred and fifty, dated November 30th, A. D. 1815, in the name of James Y. O'Carroll; that said Christian Wilt in his life-time and at the time of his death was the partner of one Joseph Hertzog, who supplied said partnership with all of its capital; that said Christian was carrying on the said partnership business in the name and under the style of Christian Wilt; that said business met with heavy losses, and that at said Christian's death it owed heavy debts; that the undivided half of the tract first above described and the whole of the tract secondly above described were partnership property acquired by said Christian on said partnership account and with the said partnership funds; and that on said Christian's death the creditors of said firm called on said Hertzog for payment, and it became necessary in closing the business of said firm that the
th title of said two tracts of land above described should be vested
235 in fee in said Joseph to enable him to secure and to pay the debts of said partnership.

And your orator further says that said Christian on his death left one child, a minor about four years old, George Wilson Wilt by name, his only heir, of whom Charles S. Hempstead was guardian, and that said Joseph Hertzog, in order to vest in himself the legal title of said lot above described and of other real estate similarly situated, for the purposes aforesaid, filed his bill in the St. Louis circuit court as a court of chancery some time in the year one thousand eight hundred and twenty-one, and such

proceedings were thereon had that on the sixth day of September, in the same year, said court rendered a decree in favor of said Joseph Hertzog, that he was entitled to be invested with the legal title in fee of said above-described moiety of the two-hundred-and-four-acre tract and of the said hundred-and-forty-acre tract, as well as of other property in said
236 bill and decree set forth; and that said Hempstead, as guardian of the said George W. Wilt, infant and sole heir of said Christian, should convey by proper deed said two tracts above described and other real property in the decree mentioned unto said Joseph Hertzog, the surviving partner of the firm aforesaid; and your orator says that said Charles S. Hempstead, in pursuance of said decree, made and executed to Hertzog a deed in fee of said six-hundred-and-forty-acre tract and of the moiety of said other tract above described, as well as of other real property, in his capacity as guardian as aforesaid; and that the said Hertzog then supposing the legal title in fee to be vested in him of said above-described tract, afterwards, to wit, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and twenty-two, by deed duly executed by himself and wife of that date conveyed the undivided moiety of the said two-hundred-and-four-acre tract, with the other property, unto said
237 James Morrison to secure to him and his representatives the sum of two thousand two hundred and eighty-six dollars; and that afterwards, by sheriff's deed dated 17th of May, A. D. 1825, upon judgment and execution against said Hertzog and sale thereunder, all the right, title, and interest of said Hertzog in said moiety of said tract, and also in said six-hundred-and-forty-acre tract, was conveyed in fee to said Henry Clay, your orator; and your orator then supposed that he had then a good legal title in fee to said moiety of said two-hundred-and-four-acre tract, and to the said six-hundred-and-forty-acre-tract. But he has been informed, and now believes, and so charges the fact to be, that the decree aforesaid, from some defect in the proceedings, was and is inoperative; and that said Hertzog, although owning and possessed of the equitable title of said tract of land, did not, by means of said decree and said Hempstead's
238 deed, obtain the legal title thereof, so that your orator, representing said Hertzog and standing in his stead, is in equity the owner of said moiety of *of* said two-hundred-and-four-acre tract and of said six-hundred-and-forty-acre tract, and is entitled to a decree for the purpose of vesting in him (your orator) the outstanding legal title; and your orator states further that George W. Wilt, who was about four years old at the time of his said father's death, died afterwards in April, in the year eighteen hundred and twenty-three, leaving as his heirs a half brother of said Christian named Abraham Wilt, living in Philadelphia; a half sister of said Christian, named Catherine, married to said Joseph Hertzog, then living in St. Louis; another half sister of said Christian, named Elizabeth, married to Michael Baker, both living in Philadelphia; another half sister of said Christian, named Anne, married to George Ritter, living in Phila-
239 delphia, and also of the whole blood another sister named Rachel, married to Charles S. Hempstead, then living in St. Louis; and another sister named Julianna, who died in *in* April, in the year one thousand eight hundred and twenty-three, without issue.

He saith further that said Rachel, wife of said Charles S. Hempstead, has died, leaving as her only children and heirs two infants, Edward

Hempstead and Charles S. Hempstead, junior, whose guardian is their father, Charles S. Hempstead; and that some time in August, in the year one thousand eight hundred and twenty-seven, said Joseph Hertzog died, leaving as his only heirs his children by said Catherine, viz: Mary, married to John Dougherty; Elizabeth, married to William Collins; Rachel, an infant; and Anne, also an infant. Your orator says further that the heirs aforesaid of George Wilson Wilt and of Joseph Hertzog all reside beyond the limits of the State of Missouri. And your petitioner further says that he understands, and believes, that said Hertzog and wife,
240 in his (said Hertzog's) life-time, executed some deed of trust, mortgage, or incumbrance upon the six-hundred-and-forty-acre tract to Robert Wash, to secure a sum of money to one Louis Devotion, which sum he charges is either paid or will be paid out of some other funds, so that the land is not and will not be bound for the same.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and cannot have a remedy in the premises except in a court of chancery, where matters of this nature are properly recognizable and relievable:

To the end, therefore, that said Edward Hempstead, Charles S. Hempstead, junior, Catherine Hertzog, Michael Baker, and Elizabeth, his wife, and George Ritter, and Anne, his wife, Abraham Wilt, John Dougherty, and Mary, his wife, William Collins, and Elizabeth, his wife, Rachel
241 Hertzog, Anne Hertzog, and Robert Wash, may upon their respective corporal oaths, true, full, and perfect answer make to all and singular the matters as fully and particularly as if the same were here again repeated and interrogated, and that all right, title, interest, and estate owned or held by said persons last above enumerated, or any of them, in law or equity in and to said moiety of said two-hundred-and-four-acre tract of land, and in and to said six-hundred-and-forty-acre tract of land may pass to and be vested in fee in your orator; and that said Wash may release to your orator all right and interest in said last-mentioned tract, which he owns or is possessed of; and that your orator may have such other and further relief in all and singular the premises as to said court shall seem meet; may it please said court to grant the writ of summons, directed to said Edward Hempstead, Charles S. Hempstead, junior,
242 Catherine Hertzog (who is likewise administratrix of said Joseph, deceased), Michael Baker, and Elizabeth, his wife, George Ritter, and Ann, his wife, Abraham Wilt, John Dougherty, and Mary, his wife, William Collins, and Elizabeth, his wife, Rachel Hertzog, Ann Hertzog, and Robert Wash, thereby summoning them to appear at the next term of the court, and to stand to and abide by such decree and order as shall be made in the premises, &c. And your orator will ever pray, &c.

J. SPALDING,
Sol'r for Compl't.

And thereupon a summons issued in words and figures following, to wit:

Summons.

COUNTY OF ST. LOUIS, *ss:*

The State of Missouri to the sheriff of the county of St. Louis, greeting:
We command you to summon Edward Hempstead, Charles S.

243 Hempstead, junior, Catherine Hertzog (as to herself, and also as administratrix of Joseph Hertzog, deceased), Michael Baker, and Elizabeth, his wife, George Ritter, and Ann, his wife, Abraham Wilt, John Dougherty, and Mary, his wife, William Collins, and Elizabeth, his wife, Rachel Hertzog, Ann Hertzog, and Robert Wash, that they be and appear before the judge of our circuit court (sitting as a court of chancery), at the next term thereof, to be held at the city of St. Louis, within and for the county of St. Louis, on the fourth Monday of November next, then and there to answer to a bill of complaint exhibited against them by Henry Clay, and have you then and there this writ.

Witness Archibald Gamble, clerk of our said court, at office, this twenty-first day of October, eighteen hundred and twenty-nine.

[SEAL.] ARCHIBALD GAMBLE, *Clerk.*

Upon which summons the sheriff made return as follows, to wit:

Sheriff's summons.

244 Executed this writ on Robert Wash, in the county of St. Louis, 6th November, 1829, by reading to him this writ and delivering to him a copy of the bill in chancery. Edward Hempstead, Charles S. Hempstead, jr., Catherine Hertzog, Michael Baker, Elizabeth, his wife, George Ritter, Ann, his wife, Abraham Wilt, John Dougherty, Mary, his wife, William Collins, Elizabeth, his wife, Rachel Hertzog, Ann Hertzog, not found in my county, and believed not be residents of this State.

R. SIMPSON, *Sh'f.*

Services, $1.00; 14 Nov.; int. % 00.

And afterwards, at the March term, A. D. 1832, of said court, the following proceedings were had in said cause, to wit:

THURSDAY, *May* 10*th*, 1832.

HENRY CLAY
vs.
CHRISTIAN WILT'S AND JOSEPH HERTZOG'S heirs, and Robert Wash.

And now, on this 10th day of May, in the year of our Lord one thousand eight hundred and thirty-two, comes the complainant and
245 prays for a decree pro confesso; and it appearing to the court that publication as to the non-resident defendants has been duly made, and that the summons was duly served on Robert Wash, one of the defendants, and that no answer has been filed by any of the defendants, the court doth therefore order said bill of complaint and its several allegations to to be taken as confessed against said defendants and each of them, and doth thereupon order, adjudge, and decree that all the right, title, interest, and estate in law or equity of the defendants Edward Hempstead, Charles S. Hempstead, jr., Catherine Hertzog, Michael Baker, and Elizabeth, his wife, George Ritter, and Anne, his wife, Abraham Wilt, John Dougherty, and Mary, his wife, William Collins, and Elizabeth, his wife, Rachel

Hertzog, Ann Hertzog, and Robert Wash, and each of them, of, in, and to the lands and tenements in St. Louis County, and described in said bill as follows, to wit, the undivided half of a tract of land containing two hundred and four acres, bounded in the north by *by* lands formerly
246 owned by Capt. William Massey, south by lands of Anthony Soulard, acquired by Christian Wilt from Simon Brewster and wife by deed dated May 12th, 1818; also another tract of land lying about three and a half miles southwest of the town of St. Louis, in the prairie called the "Barriere des Noyer," containing the quantity of six hundred and forty acres, more or less, it being a location by virtue of a New Madrid certificate, numbered one hundred and fifty, dated November 30th, 1815, in the name of James Y. O'Carroll, pass to and be vested in, and the same are passed to and hereby vested in, said Henry Clay, executor of William Morrison, in fee-simple, forever, free and clear of any claim of said defendants or either of them. And it is further ordered, adjudged, and decreed that said Wash shall, on demand, make, execute, and deliver to the complainant a release of all his right, estate, and interest, in law or equity, as trustee or otherwise, in said lands and tenements or either
247 of them. This decree is, however, entered conditionally that if said defendant Wash shall appear at the next term of this court and file his answer to the bill, on showing good cause why he has not appeared and filed his answer thereto heretofore, and on paying the costs of this decree, then this decree to him shall be set aside; and as to the other defendants to this decree is also entered conditionally, to wit, if the said last-named defendants shall not appear in five years from the date of this decree and bring their bill of review said decree shall after the end of said five years stand absolute.

And afterwards, at the March term, A. D. 1833, the following further proceedings were had in said cause, to wit:

WEDNESDAY, *April 3d*, 1833.

HENRY CLAY
vs.
CHRISTIAN WILT AND JOSEPH HERTZOG'S HEIRS and Robert Wash.

On motion of the said complainant, by his solicitor, and it ap-
248 pearing to the court that said defendant, Robert Wash, hath not appeared or made any motion to set aside the conditional decree entered against him in this case, it is therefore ordered that the said decree stand absolute against him from this day.

STATE OF MISSOURI,
County of St. Louis, ss:

I, John Lewis, clerk of the circuit court of St. Louis County, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same appear on file and of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said

court, at office, in the city of St. Louis, this 19th day of February, A. D. 1873.

[SEAL.] JNO. LEWIS, *Clerk.*

To the reading of this transcript in evidence the defendant ob-
249 jected that the same was void, incompetent, and irrelevant. The court overruled the objection, and defendant excepted thereto at the time.

Twenty-first. Transcript of the record of the chancery suit of S. McRee vs. Hempstead et al., as follows:

Chancery suit, S. McRee vs. Hempstead et al.

To the St. Louis circuit court, sitting as a court of chancery:

Humbly complaining, your orator, Samuel McRee, of the Army of the United States, states that heretofore, and some time in the August term of the St. Louis circuit court, in the year 1821, one Joseph Hertzog filed his bill of complaint in the same court, wherein he stated that in the month of June, in the year one thousand eight hundred and eleven, the said Hertzog, then residing in the city of Philadelphia, agreed with one Christian Wilt, his nephew, who had been raised in said Hertzog's store, and was then residing at St. Louis, but since deceased, to form a copartnership in the trade and business of selling merchandise in the then Louisi-
250 ana territory, and also in whatever other business they might choose to pursue in said territory, the terms of which partnership were these: the said Hertzog was to furnish all the capital, purchase the goods at Philadelphia and elsewhere at the eastward, attend to the transportation of the same, and in general to perform all those things which necessary and proper as a partner residing at the eastward; the said Christian Wilt on his part was to reside at and to superintend all the business of the concern at St. Louis and elsewhere in said territory, for which he was to have and receive one-third of the profits and suffer one-third of the losses; that, in pursuance of this understanding and agreement, it was further consented by the said Hertzog that the name and style of the firm might be as the said Christian Wilt might deem fit, who thereupon adopted the style of "Christian Wilt," under which name and
251 style they commenced business at St. Louis and elsewhere, in the now State *State* of Missouri, and continued with much success until the fall of 1818, when the said parties agreed to take into their said firm Andrew Wilt, the brother of the said Christian Wilt.

And your orator further shews that during the partnership of Christian Wilt aforesaid, the said Wilt with the goods and partnership funds, purchased a considerable real estate for and on account of the said firm, as the books of said firm will show, the title-deeds to which the said firm of Christian Wilt always took in the name of said firm of Christian Wilt; that in this way he purchased, amongst other considerable real estate situate in Missouri and Illinois, a New Madrid certificate, issued by the recorder of land titles of the United States to James Y. O'Carroll or his legal representatives (No. 150), which was afterward located by said Wilt on a tract of land which is described as follows: A certain tract or par-
252 cel of land situate, lying, and being about three and a half miles southwest of the town of St. Louis, in the prairie called the Bar-

rire des Noyes, containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by the said Christian Wilt by virtue of a certain New Madrid certificate, so called, the number whereof is one hundred and fifty, dated November 30th, 1815, in the name of James Y. O'Carroll or his legal representatives, all of which will more fully appear by reference to said location, in the office of the surveyor of the United States for Missouri, Illinois, and Arkansas, and to the deed of transfer of said certificate from James Tanner, as the legal representative of said O'Carroll, to said Christian Wilt, recorded in the recorder's office of St. Louis County, book H, pages 237 and following.

And the said bill of complaint set forth and described other real property as having been purchased by said Wilt with the same funds, and to the same uses, which said property it is not necessary herein to describe.

253 And the said bill then went on to show that the said partnership continued as aforesaid until the fall of 1818, when said Joseph Hertzog agreed to advance for the said Andrew Wilt, since deceased, his share of the capital stock, to wit, one-third; and the said Christian Wilt and Joseph Hertzog agreed that said Andrew should be taken in as equal third copartner in said firm, at St. Louis, and that the whole effects, credits, and goods, and stock in trade in the now State of Missouri of the said firm of Christian Wilt, should form the stock of the new firm to be styled C. and A. Wilt & Co., which last firm continues till the unfortunate death of said Andrew Wilt and Christian Wilt, in the summer of 1819, during the existence of which last-mentioned partnership they made no profits, and on the contrary lost much. And the said Hertzog further stated in his said bill of complaint that said Christian Wilt died without there having been any settlement of the original firm, which had contracted some

254 debts, most of which remained then still unsettled; and that the said firm of Christian Wilt had been re-established in that name since the death of the said Andrew, inasmuch as the said firm of C. and A. Wilt & Co. had made no profits, and as all the capital stock of the share of said Andrew was advanced by said Hertzog. Said bill further alleges that said Christian Wilt died intestate, leaving as his next of kin and only heir and legal representative his infant son, George Wilson Wilt, then aged about four years, the wife of said Christian having died about four years previously, and that Charles S. Hempstead (the brother-in-law of Christian) and who said bill prayed might be made defendant thereto, administered on the estate of said Christian Wilt, deceased, and was also by the circuit of the county of St. Louis aforesaid duly appointed guardian to said George W. Wilt, who was then residing with his said *gaurdian* in St. Louis. Said bill furthermore set forth that it had become necessary to secure some debts and pay others of said firm

255 of Christian Wilt, by mortgaging and selling some of the real estate above mentioned, which could not be done legally so long as the title of said real estate was in the heir of said Christian Wilt, out of whom it could not be divested but by said court of chancery. In tender consideration whereof, and forasmuch as said Hertzog, the complainant could not have adequate relief except in a court of chancery, therefore the said Hertzog therein prayed that said Charles S. Hemstead, as administrator and *gaurdian* as aforesaid, might be made to answer thereto; and

that on such answer said court would order and decree that the said Hemstead, as *gaur*dian as aforesaid, should convey and transfer by deed all the real estate mentioned in said bill to the said Hertzog, as surviving partner of said firm of Christian Wilt, for the purposes aforesaid; and the said Hertzog made oath of the truth of the statements of said , as appears by his written affidavit to said bill of complaint; and your orator
256 further states that during the same term of said court said Hemstead, *gaur*dian as aforesaid, fil*l*ed an answer to said bill of complaint, wherein it was stated that he admitted the facts stated in said bill of complaint to be true to the best of his knowledge, information, and belief, and could urge no reason why the prayer of said bill should not be granted if said court should think proper to do so, which said answer was sworn to by said Hemstead, and was signed by him as *gaur*dian as aforesaid.

And your orator further says that at the same August term, in the year 1821, the said cause, by consent, came to be heard upon the bill and answer, and a decree was thereupon entered, reciting the substance of said bill, and, among the rest, the tract of land before described; and then stating that said court did think fit, and did order and decree, and that it was thereby accordingly ordered and decreed that said Charles S. Hemstead, as *gaur*dian of said George W. Wilt, infant and sole heir of
257 Christian Wilt, deceased, should convey and transfer the several pieces and parcels of land and real estate described in said bill to said Joseph Hertzog, as surviving partner of said firm of Christian Wilt, and for the use of said firm; and that said Hemstead, a' *gaur*dian as aforesaid, should execute and deliver the proper and necessary deed or de*e*ds for the same; and that said complainant Hertzog should pay all costs and charges of said suit. And your orator further states that afterwards, on or about the 10th of September, 1821, said Hemstead executed and delivered a deed to said Hertzog, wherein he recited the said proceedings in chancery and said decree, and states, in pursuance thereof, he transfers, releases, and assigns to said Hertzog, as such surviving partner as aforesaid, all the real property described in said bill of complaint, and, among other, the tract of land before described, to have and to hold the same to him, said Hertzog, as such surviving partner, and to his heirs and
258 assigns forever, which deed was duly acknowledged and recorded.

And your orator further states that afterwards, the said Joseph Hertzog being indebted as such surviving partner as aforesaid, to Henry Clay, executor of James Morrison, deceased, in the sum of two thousand two hundred and eighty-six dollars for his debt, and also in the sum of one hundred and forty-seven dollars and forty-five cents, for his damages for the detention thereof, the said Henry Clay, executor as aforesaid, had judgment for the same in the St. Louis circuit court, and execution issued thereon from the clerk's office of said court, bearing date the 30th day of December, 1824, by virtue of which execution the sheriff of said county levied on certain parcels of the real estate belonging to *to* said Joseph Hertzog, and among others the tract of land before described; and on Thursday, the 10th day of February, 1825, did proceed to sell the same, when the
259 same was sold to the said Henry Clay; and the said sheriff of St.

Louis County, by deed dated the 17th day of May, 1825, conveyed the said tract of land to the said Henry Clay, executor of James Morrison, in fee-simple, a copy of which deed is herewith filed, marked "Exhibit A No. 1." And the said Henry Clay afterwards, by his deed duly executed, dated the 11th day of October, in the year 1839, conveyed the said tract of land to Ann McRee, James F. McRee, and your orator Samuel McRee, as the heirs and legal representatives of William McRee, deceased, to whom said Clay had sold said land, which said deed is herewith filed, marked "Exhibit B No. 2." And the said Ann McRee and James F. McRee afterwards, by their deed, dated the day of , in the year 1830 (1831), conveyed their interest in said land to your orator, which deed is herewith filed, marked "Exhibit C No. 3." By virtue of which several deeds and conveyances, your orator supposed he had the complete legal title vested in him to the tract of land before described, at least such title as had vested in said George Wilson Wilt
260 on the death of the said Christian Wilt, but is informed and believes that such is not the fact, on the ground that said proceedings in chancery did not make the said George W. Wilt a party to them, either plaintiff or defendant, and that the said decree was not as the law in such cases required to be made to pass the title.

Your orator alleges that the equitable title to said lot is unquestionably vested in him by means of the premises, and that he is entitled to the decree of this court to obtain the legal title to the same.

And your orator further shows that said George Wilson Wilt departed this life in April, 1823, and the heirs of the said George W. Wilt, who, of the whole blood, are Edward Hemstead and Charles S. Hemstead, now residing in Galena, Illinois, infants and sons of Rachel, now deceased, who was a sister of said Christian Wilt, and of the half blood Chatarine Hertzog, widow of said Joseph Hertzog, and half sister of said
261 Christian, now residing in Illinois, Elizabeth, wife of Michael Baker, residing in Pennsylvania, also half sister of said Christian, Abraham Wilt, residing in Philadelphia, also Ann Ritter, wife of George Ritter, residing in Philadelphia, and further, that said Joseph Hertzog died in August, 1827, leaving as his heirs his daughter Mary, marr*aide* to John Dougherty, residing at Liberty, Missouri, his daughter Elizabeth, now the widow of William Collins, deceased, residing in Illinois, his daughter Ann, marr*aide* to Wm. N. Wycliff, both of whom reside in Illinois, and his daughter Rachel, marr*aide* to Philip St. George Cook, an officer of the United States Army, who is not a resident of the State of Missouri.

In tender consideration of the premises, and forasmuch as your orator is remediless at law, and can obtain relief only in a court of chancery, where such matters are properly cognizable, to the end that said Edward and Charles S. Hemstead, jr., Chatenne Hertzog, Michae' Baker and Elizabeth, his wife, George Retter and Ann, his wife, Abraham
262 Wilt, John Dougherty and Mary, his wife, Elizabeth Collins, Philip St. George Cook and Rachael, his wife, and William N. Wickliff and Ann, his wife, the legal heirs of said Christian Wilt and Joseph Hertzog, and defendants herein, may true, full, and perfect answer make to all and *and* singular the premises as if here again repeated and they interrogated thereto, and in particular that they may answer and

state whether or not such partnership did not exist between said Joseph and Christian as herein before set forth, as to the time, circumstances, and stipulations, and whether said tract of land before described was not bought with said partnership funds, and whether said Wilt died at the time and in that behalf above stated, and, if not, when; and whether said George Wilson Wilt was not the only child and heir of said Christian, and did he not die at the time in that behalf above stated, and, if
263 not, when; and whether the persons above named as present heirs of said George Wilson Wilt are not in truth his heirs, and whether they are his only surviving heirs, *and whether they are his only surviving heirs*, and, if not, who are they, and where are they, his heirs; and whether said Joseph did not die at the time in that behalf above stated, and, if not, when, and who are his heirs; and whether the persons above named in that behalf are not his heirs, and, if others, who are they; and whether such proceedings in chancery, as above set forth, did not take place, such bill, answer, and decree; and whether such deeds were not executed as herein above specified, and, if not, what, how different, and what deeds; and whether said firm of Christian Wilt was not at his death largely indebted; and whether the said debt above specified was not due from said Hertzog for and on account of said firm of Christian Wilt, and therefore ought to have been paid out of said partnership funds,
264 and may be decreed to make, execute, and deliver to your orator a deed good and sufficient in law for transferring to your orator, his heirs or assigns, forever, all right, title, interest, and estate of and in the tract of land before described, with its privileges and appurtenances, which descended to them, respectively, as heirs of George Wilson Wilt and Joseph Hertzog; or that this court will decree that all such title and interest in said tract of land, in law or in equity, as resides and is vested in said defendants, and each of them, as heirs of said George Wilson Wilt or of said Joseph Hertzog, shall pass to and be vested your orator, and that a su'-pana may issu', summoning each of said persons above named as defendants, to wit, Edward Hemstead and Charles S. Hemstead, Catherine Hertzog, Michal Baker and Elizabeth, his wife, George Ritter and Ann, his wife, Abraham Wilt, John Dougherty and Mary, his wife, William Collins and Elizabeth, his wife, Philip St. George Cook and Rachel,
265 his wife, and William N. Wickliff and Ann, his wife, to be and appear in this honorable on the day named, there to abide by such order and decree as shall be made in the premises, and that such other and further relief may be granted as to this court may seem agreeable to equity and good conscience, &c.

And your orator will ever pray, &c.

GAMBLE AND BATES,
Solicitors for Complainant.

Summons.

STATE OF MISSOURI,
County of St. Louis, ss:

To the sheriff of Clay County, greeting:

We command you to summon John Dougherty and Mary Dougherty

his wife, if they be found in your county, that they be and appear before the judge of our circuit court on the first day of the next term thereof, to be held at the city of St. Louis, within and for the county of St. Louis, on the third Monday of November next, then and there to answer unto Samuel M'Ree of his bill in chancery, and have you then and there this writ.

266 Witness John Ruland, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this twenty-third day of March, in the year of our Lord eighteen hundred and forty-four.

[SEAL.] JOHN RULAND, *Clerk*,
By CHAS. B. CLEMENTS, *D. C.*

Sheriff's return.

I, John Baxter, sheriff of Clay County, hereby certify that I executed the within writ by reading a certified copy of the original bill of complaint accompanying *of* said writ and writ of summons to the within-named John Dougherty and Mary Dougherty, his wife, in Clay County, on the 10th day of August, A. D. 1844, and by delivering to John Dougherty the certified copy of the original bill accompanying said writ, he being *the* first summoned in Clay County on the said 10th day of August, A. D. 1844.

JOHN BAXTER,
Sheriff of Clay County, Mo.

267 *Affidavit of non-residence.*

SAMUEL MCREE
vs.
EDWARD HEMSTEAD ET AL.

Hamilton R. Gamble, being duly sworn, upon his oath says that he has made inquiries to ascertain the places of residence of the different defendants in this case, and he says that he verily believes that Edward Hemstead, Charles S. Hemstead, jr., Catherine Hertzog, Michael Baker and Elizabeth, his wife, George Ritter and Anne, his wife, Abraham Wilt, Elizabeth Collins, Philip St. George Cook and Rachel, his wife, William N. Wickliff and Anne, his wife, are *now* [non] residents of the State of Missouri.

H. R. GAMBLE.

Sworn to and subscribed before me March 23, 1844.
JNO. RULAND, *Clerk.*

Proof of publication.

In the St. Louis circuit court, November term, 1845.

MONDAY, *November* 24th, 1845.

268 SAMUEL MCREE
vs.
EDWARD HEMSTEAD, CHARLES S. HEMSTEAD, Catherine Hertzog, Michael Baker and Elizabeth, his wife, George Ritter and Anne, his wife, Abraham Wilt, John Dougherty and Mary, his wife, William Collins and Elizabeth, his wife, Philip St. George Cook and Rachel, his wife, and William N. Wickliff and Anne, his wife.

Now, at this day comes the complainant by his solicitor, and on his motion, and it appearing to the court that the order of publication heretofore made in this cause has not been published, it is therefore ordered that the same be renewed, and that the above-named defendants, except John Dougherty and Mary, his wife, non-residents of the State of Missouri, be, and they are hereby, notified that said complainant has filed his bill of complaint against them, the allegations and substance whereof are and object is to obtain a decree against the said defend-
ants to restore, make, execute, and deliver a deed or deeds, good
269 and sufficient in law, for transferring to said complainant, his heirs and assigns, forever, all the right, title, and interest of the defendants which descended to them as heirs of George Wilson Wilt or of Joseph Hertzog in and to a certain tract or parcel of land, situate, lying, and being about three and a half miles southwest of the town of St. Louis, in the prairie called the Barriere des Noyer, containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by Christian Wilt, by virtue of a certain New Madrid certificate, so-called, the number whereof is one hundred and fifty, dated November 30th, 1815, in name of James Y. O'Carroll or his legal representatives, which will more fully appear by reference to said location in the office of the surveyor of the United States for the States of Missouri, Illinois, and Arkansas, and to the deed of transfer of said certificate from James Tanner, as the legal representatives of said O'Carroll, to said Christian
270 Wilt, recorded in the recorder's office of St. Louis County, in book H, page 237 and following; or that said court will decree the title to said tract of land to pass and be vested in said complainant, which said tract of land the complainant claims as having acquired the title under a decree of the St. Louis circuit court, in chancery, erroneously entered in a suit of Joseph Hertzog against the said George Wilson Wilt.

And it is further ordered that said defendant' be notified that unless they be and appear before this court at the next term thereof, to be begun and held at the city of St. Louis, for the county of St. Louis, on the third Monday of April next, and on or before the sixth day thereof plead, answer, demur, or except to said bill, the same will be taken against them for confessed.

And it is further ordered that a copy hereof be published, according to law, in some newspaper printed in the city of St. Louis.

271 JOHN RULAND, *Clerk.*

A true copy.

GAMBLE AND BATES,
Attorneys.

January 24, 1846, W. & W. Sat.

Messrs. Gamble and Bates to St. Louis American, Dr.

1845.
Jan. 24. To publishing the annexed adver. 8 w..... $11 25
Received payment, Ap'l 22d, 1846.
JA. M. JULIAN & CO.,
Per OLIVER HARRIS.

STATE OF MISSOURI,
County of St. Louis, ss:

Personally appeared before the undersigned, justice of the peace within and for the county of St. Louis, Ooliver Harris, who, being duly sworn, on his oath says that he is one of the publishers of the St. Louis American, and that the advertisement was published eight weeks in said paper, as follows:

The first insertion was on the 24th of Jan., 1846, in No. 40; the second on the 31st Jan., in No. 46; the 3rd on the 7th of Feb., No. 52; the 4th on the 14th Feb., No. 58; the 5th on 21st Feb., No. 64; the 6th on the 28th Feb., No. 70; the 7th on the 7th March, No. 76; and the 8th on the 14th March, 1846, in No. 82.

OLIVER HARRIS.

272 Sworn to and subscribed before me this 22nd day of April, 1846.
ALPHONSO WETMORE, *J. P.*

Decree.

In the St. Louis circuit court, in chancery. April term, 1848. June 30th, 1846.

SAMUEL MCREE
vs.
EDWARD HEMSTEAD, CHARLES S. HEMSTEAD, Catherine Hertzog, Michael Baker and Elizabeth Baker, his wife, George Ritter and Anne, his wife, Abraham Wilt, John Dougherty and Mary Dougherty, his wife, Elizabeth Collins, Philip St. George Cook and Rachel Cook, his wife, William H. Wickliff and Anne, his wife.

And now, at this day, comes the complainant, by his solicitor, and it appearing to the court that the defendants have all been duly notified, ac-

cording to law, by publication and by process, and that decrees have been entered against the said defendants upon their failure to file their
273 answer as required by law, taking the complainant's bill confessed, and there being no answer filed by any of said defendants, the court doth think fit to order, adjudge, and decree, and it is accordingly ordered, adjudged, and decreed, that the decrees nisi heretofore entered be made, and they are hereby made, absolute against all the defendants.

And it is further decreed that all right, title, interest in and to the tract of land in the complainant's bill described, being a certain tract or parcel of land situate, lying, and being in Saint Louis County, about three and a half miles southwest from the former town of Saint Louis, in the prairie called the Barriere des Noyer, containing the quantity of six hundred and forty acres, being the tract located under a New Madrid certificate, number one hundred and fifty, dated the thirtieth day of November, in the year eighteen hundred and fifteen, in the name of James Y. O'Carroll, or his legal representatives, pass from all the said defendants to the said complainant, and be vested in him, said Samuel McRee, and his heirs,
274 in fee-simple, and that the complainants pay the costs of this cause, and that execution issue therefor.

STATE OF MISSOURI,
County of St. Louis, ss:

I, Stephen Rice, clerk of the circuit court, certify the foregoing to be a true copy of a decree in chancery made in the above-entitled cause, as fully as the same remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of Saint Louis, this 24th day of November, A. D. 1863.

[SEAL.] STEPHEN RICE, *Clerk.*

To the reading of this transcript defendant objected that the same was incompetent and irrelevant. The court overruled the objection, and defendant excepted at the time.

Twenty-second. Proceedings of the board of commissioners on the claim of Jas. Y. O'Carroll, as follows:

Proceedings board of com'r' on claim of J. Y. O'Carroll.

Noms des personnes qui ont eu permission de s'établier sur les
275 terres vaccantes par l'ordre de Mr. François Lesieur, capitaine de milice de la Majesté Catholique, *dei* cartou la petite prairie, district de la Nouvelle Madrid, No. 15, James Youns O'Carrolles, a ca permission de l'établier sur les terres vacantes le six septembre, 1803.

La liste ci-contre et d'autre part contiens les noms des différentes personnes dont je me rappelle un ce moment, et perfaitement *g*uoi *g*u'il peut *q* avoir quelque autres personnes, dont je puis me rappeler exactement de leur noms.

LOUISIANA TERRITORY,
New Madrid , *ss:*

I, Francis Lesieur, appointed representative of the commandant of the

said district for the Little Prairie by official letter of Dr. Henry Peyron, com't, dated 16 December, 1801, do swear that the foregoing list of permissions to settle by me granted in pursuance of said authority is believed to be correct.

Given under my hand, at New Madrid, the 16th June, 1808. Sworn in open board, at New Madrid, 16 June, 1808.

FREDERICK BATES.

276 RECORDER'S OFFICE,
St. Louis, 25 *February*, 1851.

I certify that the foregoing is correctly transcribed from the original list on file in this office.

ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

This translation added to this paper after this space was crossed over.
A. R.

Translation of the above part in French.

Names of the persons who had permission to settle on the vacant lands under the authority of Mr. Francis Lesieur, captain of militia for her Catholic majesty at the post of Little Prairie, district of New Madrid. No. 15, James Young O'Carroll, had permission to settle on the vacant land Sept., 1803.

The foregoing list contains the names of the several individuals whose names I now perfectly recollect, though there may be other persons whose names I do not exactly remember.

12 February, 1857.

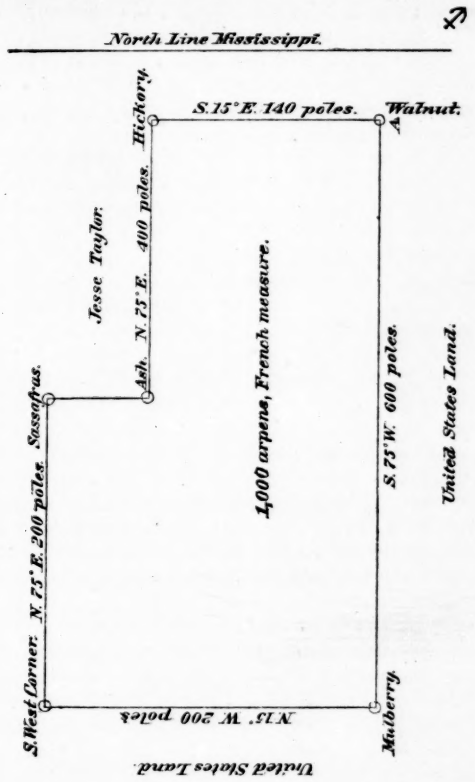
Correctly translated.

277 ADOLPHE RENARD.

Claim, statement, and notice.

James O'Carroll claims to hold 1,000 arpens of land, situated in the district of New Madrid, under the second section of the act of Congress made and provided. Proprietor district of New Madrid, James Y. O'Carroll, settlement of Little Prairie.

NOTA.—This land is situated on the river Mississippi, and about two miles from the village of Little Prairie.



I do certify that the above plot represents one thousand arpens of land, French measure, situated in the district of New Madrid, Louisi-
278 ana Territory, and surveyed by me at the request of James Y. O'Carroll, who claims the same as his settlement right by virtue of the second section of the act of Congress respecting such claims, and passed on the 2nd day of last March.

Given under my hand the fourteenth day of February, in the year of our Lord one thousand eight hundred and six, at New Madrid.

M. AMOUREUX,
Dep'y Surveyor, D't New Madrid.

Received for record, St. Louis, the 27th February, 1806.

ANTOINE SOULARD,
Surveyor G'al, T. V. Louis'a.

(See record-book A, p. 424, and original plot.)

MARCH 13, 1806—3 o'clock p. m.

The board met agreeably to adjournment. Present, the honorable Clem-

ent B. Penrose and James L. Donaldson, esqrs. James Y. O'Carroll, claiming as aforesaid 1,000 arpens of land, near the Mississippi, district of New Madrid, produces a certificate of a permission to settle, from Francis Lesieur, prior to 20' December, 1803, dated 5' December, 1805, and
279 A certificate of survey, dated February 27, 1806 (X as aforesaid, to wit, under the second section of the act of 2nd March, 1805.)

George Ruddell, being duly sworn, says that claimant did, prior to and on the 20th day of December, 1803, actually inhabit and cultivate the said tract of land, and had then a wife and 3 children.

The board grant the said claimants 1,000 arpents of land, situate as aforesaid, provided so much be found vacant there.

On motion, adjourned to to-morrow, ten o'clock a. m.

CLEMENT B. PENROSE.
JAMES L. DONALDSON.

(See book of minutes No. 1, p's 155, 159 and 161.

MONDAY, *July* 10, 1809.

Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

James Y. O'Carroll, claiming 1,000 arpents of land, situate on the Mississippi, district of New Madrid, produces to the board a certified list of pre-
emptions to settle given by Francis Lesieur, commandant, and sworn
280 to by him before Frederick Bates, commissioner, June 16, 1808, on which list claimant is No. 14.

The foregoing testimony in the foregoing claim, taken as aforesaid at New Madrid, June 17, 1808, by Frederick Bates, commissioner.

Jacob Waggoner, duly sworn, says that premises were inhabited and cultivated by claimant in the year 1802 or 1803, and constantly to the present time, about 10 or 12 acres now in cultivation. Claimant had a wife and three children in 1803.

Laid over for decision.

Board adjourned till Wednesday next, nine o'clock a. m.

(See book of minutes No. 4, p's 120, 122, and 121.)

FRIDAY, *December* 14, 1810.

Board met. Present, John B. C. Lucas, Clement B. Penrose, and Frederick Bates, commissioners.

James Y. O'Carroll, claiming 1,000 arpents of land (see book No. 1, page 159; book No. 4, page 122), the board granted to James Y. O'Carroll three hundred and fifty arpens of land, and order that the same
281 be surveyed as nearly in a square as may be, and so as to include the improvements.

Board adjourned till Wednesday next, ten o'clock a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.

(See minutes of the old board, book No. 5, p's 31, 32, and 33.)

THURSDAY, *June* 20, 1811.

Board met. Present, Clement B. Penrose and Frederick Bates, commissioners.

Cert. 1040, James Y. O'Carroll, book 5, p. 32, survey at expense of United States.

Board adjourned till to-morrow, 8 o'clock, a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

(See book No. 5, p's 187, 188, 193.

Commissioner's certificate No. 1040, June 20, 1811.

LOUISIANA:

We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to land in the Territory of Louisiana, have decided that James Y. O'Carroll, original claimant, is entitled to a patent under
282 the provisions of the 2nd section of an act of Congress of the United States entitled "An act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans, and the district of Louisiana," passed the second day of March, one thousand eight hundred and five, for three hundred and fifty arpents of land, situate in the district of New Madrid, on the Mississippi, and order that the same be surveyed as nearly in a square as may be, and so as to include his improvements, by virtue of a permission from the proper Spanish officer, and also of actual inhabitation and cultivation prior to and on the twentieth day of December, one thousand eight hundred and three.

JOHN B. C. LUCAS,
CLEMENT B. PENROSE.
FREDERICK BATES.

(See original certificate on file.)

Testimony as to lands in New Madrid damaged by earthquakes.

James Y. O'Carroll, claiming six hundred and forty acres of land, No. 1040 of comm's certificate, and extended by Recorder William Kin-
283 cheloe, duly sworn, says that this tract was materially injured by earthquakes.

St. Louis, Nov. 10, 1815.

(See registry of testimony as to land damaged in New Madrid, p's 1, 28, and 29.)

Certificates of material injury by earthquakes.

Nos.	Names of claimant on record.	Quantity.	Situation and remarks.
150...	James Y. O'Carroll.....	640 acres....	Mississippi; cert. dated Nov. 30, 1815; deliv'd. James Tanner.

(See registry on file.)

A list of relinquishments of lands materially injured by earthquakes in the late county of New Madrid, present State of Missouri, under act of Congress of 17th February, 1815:

No. of pat. cert.	Claimant of record.	Quantity.	Situation.	Relinquishment by whom, and gen'l remarks.
150.....	James Y. O'Carroll..	640 acres....	Mississippi	James Tanner, legal rep's.

(See registry on file.)

A list of patent certificates prepared for issue by the recorder of land titles under the act of Congress of 17th February, 1815, and the supplementary acts, for the relief of those inhabitants of the county of New Madrid who suffered by earthquakes:

Date.	No. of p. cert.	No. loc. cert.	Original claimant.	No. of survey.	Acres.	To whom delivered.
1841. 16 Aug...	447	150.....	James T. O'Carroll.	2,498.....	640....	Gen'l Wm. Milburn.

(See registry on file.)

284 A.

Opinions of the recorder of land titles for Missouri Ter'y as to claims entered under act of 13th June, 1812, and proven before 1st Jan'y, 1814, as provided by the act of 3rd March, 1813; comprehending also the claims in the late district of Arkansas, which by act of 2nd August, 1813, were permitted to *by* entered until 1st January, 1814, and proven until first of July, 1814; together with the extension of quantity provided by 14th sec. of the act of 3rd March, 1813, and confirmations under the act of 12 April, 1814:

Warrant or order of survey.	Survey.	Notice to the recorder by whom.	Quantity claimed.	Where situated.	Pos'r inhabi. and cult'd.	Opinions of the recorder.
By U. S. comr's for 350 aps. Cert. 1040.	Survey..	James Y. O'Carroll.	1,000 arpents.	Mississippi, New Madrid.	.....	Granted 640 acres. A. p. 424-5, p. 188.

RECORDER'S OFFICE, *St Louis*, 25 *February*, 1851.

The above is correctly transcribed from pages 1 and 18, in book No. 1, being one of the five small books in this office, with the following indorsement on the first, and also in the fifth book, believed to be in the handwriting of Frederick Bates, to wit: These five small books
285 are originals, in the proper handwriting of the undersigned, being his decisions on land claims since the adjournment of the late board. They were arranged and fairly transcribed for report to the Commissioner of the General Land Office, but not yet recorded in the books, because they have no authority till sanctioned by the Government.

St. Louis, Nov. 1, 1815.

FREDERICK BATES,
Recorder of Land Titles.
ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

Fee, $1.00.

RECORDER'S OFFICE,
Saint Louis, 4th March, 1851.

I certify that the foregoing, on pages 1, 3, 4, 5, and 6, is, with the attached paper, marked "A," a correct and complete transcript from the books, records, plats, files, documents, and registry in this office of the claim of James Y. Carroll or his legal representatives to six hundred and forty acres of land.

ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

286	Fee, writing	$1 50
	Fee, plat	30
	Fee, *loaf* cert	1 00
	Fee, two cert	50
	Fee, 3 abstracts	75
		$4 05

A. REY.

Twenty-third. Patent certificate to James Y. O'Carroll, issued 26' March, 1862, as follows:

Pat. certificate to J. Y. O'Carroll, Mar. 26, 1862.

OFFICE OF THE RECORDER OF LAND TITLES,
Saint Louis, 26th March, 1862.

Patent certificate No. 494.

It is hereby certified that under the provisions of the second section of the act of Congress approved the 17th of February, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," Frederick Bates, recorder of land titles in that Territory, issued, on the 30th of November, 1815, his certificate numbered 150 to James Y. O'Carroll, or his legal representatives, for six hundred and forty acres of land in lieu of a tract of same amount that had been confirmed to said O'Carroll but since relinquished to the United States
287 under the said act. It is further certified that appears from the accompanying plat and transcript of survey numbered 2498, authenticated and returned to this office on this day by William Cuddy, surveyor-general for Illinois and Missouri—it is further certified that said survey No. 2498 is in part interfered with by the following surveys and other claims, to wit: Survey numbered 3125 of the Saint Louis Commons, confirmed by the act of Congress of 13th June, 1812, entitled "An act making further provision for settling the claims to land in the Territory of Missouri;" survey No. 2973, of Amable Guion, or Veuve le Compte's legal representatives; 3307, of Joachim Roy's legal representatives; and 3308, of Hubert dit Berry Tabeau's legal representatives, which was confirmed by the said act of 13th June, 1812, and the supplementary act of the 26th May, 1824, entitled "An act supplementary to an act passed on the thir-

St. P. 3, p. 291, where the claimant is erroneously called James G. O'Carroll.

teenth day of June, one thousand eight hundred and twelve, entitled 'An act making further provision for settling the claims to land in the
288 Territory of Missouri;'" survey No. 3183, of Francis Cottard, confirmed by the act of Congress of 29th April, 1816, entitled "An act for the confirmation of certain claims to land in the western district of the State of Louisiana, and in the Territory of Missouri;" and survey No. 3182, of Joseph Motard or his legal representatives, confirmed by the act of Congress of the 4th of July, 1836, entitled "An act confirming claims to land in the State of Missouri, and for other purposes," but which survey No. 3182 was land reserved at the time of the location of the claim of James Y. O'Carroll.

Now, therefore, be it known that James Y. O'Carroll, or his legal representatives, is entitled to receive a patent for the aforesaid survey No. 2498, saving and excepting therefrom the interferences aforesaid, which amount to three hundred and seventy-nine acres and seventy-two hundredths of an acre, with the express understanding that this saving and excepting clause is not intended to preclude the said James Y. O'Car-
289 roll or representatives from seeking a judicial settlement *or* his or their rights, if any exist, to said interferences.

U. S. Recorder of Land Titles in the State of Missouri.

To the COMMISSIONER OF THE GENERAL LAND OFFICE,
City of Washington:

OFFICE OF THE RECORDER OF LAND TITLES;
St. Louis, 10th December, 1862.

The foregoing is correctly transcribed from pages 73 and 74 of the book containing the record of patent certificates on file in this office.

THOMAS S. NELSON,
U. S. Recorder of Land Titles in the State of Missouri.

Twenty-fourth. Copy of deed from James Tanner to the United States, dated May 2nd, 1818, as follows:

On the 8th day of June, 1818, rec'd for record, and the same day recorded the following deed:

Deed from Tanner to United States, May 2, 1818.

This deed witnesseth that I, James Tanner, for and in consideration of the benefits of the act of Congress passed February 19th, 1818, giving those who had lands materially injured in the county of New Mad-
290 rid by earthquakes shall be entitled to remove the like or greater quantity on, &c., any of the public land in the Territory of Missouri the sale of which is authorized by the law; and I, James Tanner, being one of those who is entitled to the benefits of said act, do, by these presents, release, remise, and forever quitclaim to the Government of the United States to the following claims and tracts of land, to wit: One tract of six hundred and forty acres of land, the only claim and improvement-right of Francis Jaunis; also one other tract of six hundred and forty acres of land, the settlement and improvement right of Anthony Jaunis, both situate, lying, and being on the waters of the Black Fork of

White River; also another tract of six hundred and forty acres, situate in the county of New Madrid, lying and being between New Madrid and Little Prairie, the settlement and improvement-right of Wm. Pateson; also, one other tract of four hundred arpens of land, situate in said county of New Madrid, a Spanish grant to Jacob Bogard; also one other
291 tract of six hundred and forty acres of land, the settlement and improvement right of Francis Chateguy, lying and being in the county of New Madrid, and on the river St. Francis; also one other tract of two hundred and forty arpens, lying and being in the said county of New Madrid, and on the bayou of St. Thomas, a Spanish grant to Francis Colley; also one other tract of one hundred and thirty arpens of land, situate on the river Mississippi, a Spanish grant to Charles Gilbault, situate in the county of New Madrid; also two lots lying, situate, and being in the village of Little Prairie and the said county of New Madrid, granted to the said Charles Gilbault; all of which I acknowledge to have received certificates for the like quantity.

Given under my hand and seal this 2nd day of March, 1818.

JAMES TANNER. [SEAL.]

STATE OF MISSOURI,
County of New Madrid, ss:

I, Richard H. Hatcher, clerk of the circuit court and ex officio recorder in and for the county of New Madrid, in the State of Missouri, do
292 hereby certify that the foregoing is a true, full, and complete transcript of the record of a deed from James Tanner to the United States, with the certificate of record of same as same appears of record on pages seventy-six and seventy-seven of book number ten of the records of said county.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office, in the town of New Madrid, this 18th day of March, A. D. 1855.

[SEAL.] RICH'D H. HATCHER, *Clerk.*

Twenty-fifth. Copy of will of S. McRee, dated October, 1845, admitted to probate August 21, 1849, as follows:

Will of S. McRee.

I, Samuel McRee, of the United States Army, make this my last (torn out) and testament. I direct that all my just debts be paid. I beq. (torn) to my eldest son living at my death, my watch and yatagan, and to each of my other children living at my death I bequeath a watch, to be purchased by executrix for them. I devise and bequeath to my wife,
293 Mary McRee, all my estate, real and personal, and all monies, choses in action, and effects which now belong to me, or to which I may be entitled at my death, wheresoever the same may be situated, or by whatsoever title the same may be held, out of which is excepted the legacies before given to my children: To have and to hold the whole of my estate so devised and bequeathed to her unto the said Mary McRee and her heirs.

In thus vesting in my wife the title to my whole estate and property

I am influenced by the consideration that if this, my will, shall go into force by my death the whole responsibility of training up and educating our children will be thrown upon my wife, and I regard it as proper that my children shall feel their dependence upon their surviving parent. I have such confidence in my wife's judgment and discretion that I feel that I can safely leave to her for the proper use of my estate for her benefit and that of our children, and the proper division of it among the
294 children as circumstances may require, and therefore I give it all to her.

I name my wife, Mary McRee, my sole executrix and revoke all other wills.

In testimony whereof I have hereto set my hand and seal this second day of October, eighteen hundred and forty-five.

S. McREE. [SEAL.]

Signed, sealed, published, and declared by the testator to be his last will, in our presence, who, in his presence, and at his request, and in the presence of each other, subscribe our names as witnesses.

H. R. GAMBLE.
BARTON BATES.

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this twenty-first day of August, in the year of our Lord one thousand eight hundred and forty-nine, before me, Peter Ferguson, judge of probate of the county of Saint Louis, personally appeared Hamilton R. Gamble and Barton Bates, subscribing witnesses to the preceeding instrument in writing, who, being by me duly sworn,
295 on their oath say that they believe that Samuel McRee, the testator, signed his name to said instrument in their presence, and, as well as they recollect, published and declared the same to be his last will; that they subscribed their names thereto in the presence of the testator as witnesses to the same, and that at the time of so doing he, the testator, was of sound and disposing mind, to the best of their knowledge and belief.

H. R. GAMBLE.
BARTON BATES.

Sworn to and subscribed before me this 21st day of August. 1849.

PETER FERGUSON,
Judge of Probate.

I, Peter Ferguson, judge of probate of the county of Saint Louis, having examined the preceeding instrument in writing purporting to be the last will and testament of Samuel McRee, and the testimony of Hamilton R. Gamble and Barton Bates, subscribing witnesses thereto, consider that said instrument is duly proved to be the last will and testament of said Samuel McRee, deceased.

296 In testimony whereof I hereto set my hand and affix the seal of the probate court of the county of St. Louis, at office in said county, this twenty-first day of August, in the year one thousand eight hundred and forty-nine.

[SEAL.] PETER FERGUSON,
Judge of Probate.

STATE OF MISSOURI,
County of St. Louis, ss:

I, Milton H. Wash, clerk of the probate court of the county of Saint Louis, certify that the foregoing is a true copy of the last will and testament of Samuel McRee, deceased, as the same remains on file and of record in the office of the judge of probate of the county of Saint Louis, aforesaid.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at office in the city of Saint Louis, this twenty-sixth day of November, in the year of our Lord one thousand eight hundred and sixty-three.

[SEAL.] MILTON H. WASH, *Clerk.*

[U. S. rev. stamp, 5 cents.]

297 Twenty sixth. Copy of letter from comm'r G. L. O., to Thomas S. Nelson, recorder, dated Jan. 9, 1863; also order of T. S. Nelson, recorder, dated December, 1862, and decision of Secretary of the Interior, dated March 2nd, 1863, as follows:

Letter from Com'r G. L. O. to Nelson.

GENERAL LAND OFFICE, *January 9th*, 1865.

SIR: Hon. C. Gibson has filed in this office your order dated December, 1861, declaring "Patent certificate No. 447, issued 16th August, 1841, in the name of James Y. O'Carroll, original claimant, under United survey No. 2498, under New Madrid certificate No. 150, for 640 acres," to be set aside and annulled as void and of no effect.

Another pat. cert. dated 26th March, 1862, numbered 494, having been issued in l'*ue* of the above mentioned (No. 447), and made the basis of a patent for the claim of O'Carroll, the pat. cert. No. 447, in regard to which you have issued the order of annullment, and which is on our files, will there remain inoperative.

Very respe., &c.,

J. M. EDMUNDS, *Comm'r.*

To T. S. NELSON, Esq.,
Recorder of Land Titles, St. Louis.

298 OFFICE OF RECORDER OF LAND TITLES,
St. Louis, May 4th, 1863.

I hereby certify that the above is correctly transcribed from a letter, the original which is on file in this office.

THOMAS S. NELSON,
U. S. Recorder of Land Titles in the State of Missouri.

Order of Nelson, recorder, Dec. 1862.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, Mo., December, 1862.

It is ordered that patent certificate No. 447, issued on the 16th day of August, 1841, in the name of James Y. O'Carroll, original claimant under

United States survey No. 2498, under New Madrid certificate No. 150, for 640 acres, and delivered to General William Milburn, being in contravention of the directions of the Commissioner of the General Land Office, and having been erroneously issued, is hereby set aside and annulled, and declared to be void and of no effect.

THOMAS S. NELSON,
Recorder.

ST. LOUIS, *May 4th*, 1863.

I hereby certify that the above is correctly copied from a list
299 containing abstracts of New Madrid locations on file in this office.

THOMAS S. NELSON,
U. S. Recorder of Land Titles in the State of Missouri.

Decision of Secretary of Interior.

DEPARTMENT OF THE INTERIOR, *March 2d*, 1863.

SIR: Upon the application of C. Gibson, esqr., for an affirmance of your instructions, bearing date January 9th, 1863, to the recorder of land titles, St. Louis, Missouri, whereby patent certificate No. 447, in the case of O'Carroll, is declared inoperative, another patent certificate, No. 494, having been issued in lieu of the above mentioned, the object of this is to inform you that the aforesaid instructions are accordingly hereby reaffirmed, pursuant to the order of the Secretary of the Interior, and you will inform the recorder at St. Louis of the fact.

Very respectfully, your ob't serv't.

W. J. OTTO.
Assistant Secretary of the Interior.

Hon. J. M. EDMUNDS,
Commissioner of the General Land Office.

OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, May 4th, 1863.

300 I hereby certify that the above is a correct transcript from a copy of a letter from W. J. Otto, Ass't Sec. of the Interior, to Comm'r J. M. Edmunds, dated March 2nd, 1863, on file in this office.

THOMAS S. NELSON,
U. S. Recorder of Land Titles in the State of Mo.

To the reading of each of these documents defendant objected that they were, and each of them was, incompetent and irrelevant. The court overruled the objection in each case and defendant in each case excepted at the time thereto.

Evidence was given tending to prove that P. Chouteau had taken possession of the tract of land to him conveyed by R. Wash in 1824, immediately upon its conveyance to him, and built a dwelling house, outhouses, &c., thereon, put up fences, planted an orchard, &c., and had constantly and continually held the same from that time until his death in 1865, claiming the same as his own, and that the plaintiffs, who were his
301 legal representatives, had held the same since his death until evicted by Gibson in 1872, by the judgment in ejectment reported 50 Mo. Rep., p. 85.

The plaintiffs then examined as a witness Wm. H. Cozens, who testified as follows:

Testimony of Wm. H. Cozens.

W. H. COZENS, sworn and examined on the part of the plaintiff, testified as follows:

By Mr. GLOVER:

1. Q. Mr. Cozens, please state to the court where you reside.

A. I reside in the city of St. Louis.

2. Q. How long have you resided in St. Louis?

A. All my life; born here.

3. Q. What is your occupation, and has been your business in life?

A. Land surveying and civil engineering; forty years and over.

(Plaintiff produces and shows to witness a plat, marked "Gibson against Chouteau," a plat made by William H. Cozens, and asks the witness if he made that plat.)

A. Yes, sir; I made that plat.

4. Q. Have you had any acquaintance, Mr. Cozens, with the tract of land, being survey 2498, in the name of James Y. O'Carroll, under the New Madrid survey, certificate 150?

A. Yes, sir.

The COURT. What is the question in regard to that map?

5. Q. If he made it?

302 A. I made this map.

(The question was repeated.)

A. I have surveyed this land.

6. Q. Are you acquainted with the boundaries, corners, and lines?

A. Yes, sir; have surveyed them in whole and in part several times.

7. Q. On the map, sir, which I have referred you to please state what tract this is that is laid down upon the map referred to in blue lines.

A. The blue lines, the blue tinted lines, are intended to represent the out boundaries of survey 2498, made by James Y. O'Carroll.

8. Q. Or his legal representatives?

A. Or his legal representatives for 640, acres of land.

Q. What tract of land is that in the yellow shade, being B, A, D, and C, on said plat?

A. It represents the land claimed by Pierre Chouteau, junior, as having been purchased from Joseph Hertzog's trustees, as also from Samuel McRee and wife.

10. Q. And Pierre Chouteau?

A. Pierre Chouteau, junior, purchased from Joseph Hertzog's trustee, and from Samuel McRee and wife, embraced in that line A, B, and C.

11. Q. Do you know, Mr. Cozens, what land Charles P. Chou-

303 teau and his sister, Mrs. Maffit, are now in possession of inside of the tract *a*, *b*, *c*, and *d*?

A. Yes, sir; represented by the line *a*, *e*, *f*, and *d*.

12. Q. Do you know who is in possession of that part of the tract of that yellow shade represented by the line *b*, *c*, *f*, and *e*?

A. Yes, sir; *b*, *e*, *f*, and *e* is in the possession of Mr. Charles Gibson.

13. Q. Do you know, Mr. Cozens, the tract of land, the boundaries,

and corners, the boundaries of the tract of land conveyed by Samuel Mac Ree and wife to James H. Lucas and Anna L. Hunt by deed of the date of October 16th, 1845?

A. Yes, sir. I have read that deed, and I locate it on this map, colored or tinted red.

14. Q. And represented by what letters?

A. Represented by the letters *g*, *h*, *i*, and *j*, in red ink.

15. Q. How is that land bounded west?

A. Bounded on the west by the land claimed by Pierre Chouteau under those two deeds, one from Hertzog and one from MacRee.

16. Q. Are you acquainted with the limits, metes, and bounds of survey 3307, 3308, and 3309?

Yes, sir.

17. Q. And 2973?

A. 2973 is the one that is covered in part by this tract of land
304 sold by Samuel MacRee and wife to James H. Lucas and Anna L. Hunt, and lies in the northern portion of James Y. O'Carroll's tract, the next south of that.

18. Q. And in whose name?

A. In the name of Amabel Guion, under the widow Lecompte. It is one of the cul-de-sac series, of the cul-de-sac fields.

19. Q. Now, survey 3307?

A. Survey 3307 lies immediately south, and adjoining the widow Guinon's tract, so called, in the name of Joachim Roy's legal representatives.

20. Q. No. 3308, where is that located?

A. It lies immediately south, and adjoining 3307, in the name of Hubert dit Berry Tebau's legal representatives.

21. Q. Are you acquainted with the lines of this survey 2932, 3307, 3308, and 3309?

A. I am, sir.

22. Q. Are they properly represented on that plat?

A. They are properly represented as they exist in the ground.

23. Q. Now, 3309?

A. It lies immediately south of and adjacent to 3308, and is located in the name of Calve for two by 40 arpents, and his most southern lot went by the name of cul-de-sac fields.

24. Q. You have had occasion to become acquainted with all
305 these tracts of land by surveying?

A. By surveying, sir.

25. Q. Did you ever survey all the eastern line of the 64 acres to which you have referred, as claimed by Pierre Chouteau, junior, under Joseph Hertzog's trustees, and under Samuel MacRee and wife?

A. I have, sir.

26. Q. At what time did you survey that?

A. I surveyed that in 1847.

27. Q. Under what circumstances?

I surveyed that particular piece of ground for Mr. Pierre Chouteau, at the request of Mr. Charles Chouteau, who superintended the survey at the time for his father.

28. Q. Did you survey the land lying east of it?

A. I did.

29. Q. Who for?

A. For Samuel MacRee?

30. Q. Please state under what circumstances you made those surveys for Chouteau and MacRee?

A. I surveyed this for Mr. MacRee at his request. Surveyed all his land that he held in that survey, that tract of land and one he held to the west of the river Des Peres; another tract which he owned which he bought from the Lindells, I think.

Mr. GIBSON. What do you mean by that tract of land, all his possessions out there?

306 A. All his possessions out there of this survey 2498.

31. Q. Did you have any interview with Mr. Chouteau and Maj. MacRee in regard to surveying the division line, the eastern line of the 64 arpens, and western line of the residue of the James Y. O'Carroll tract; if so, state what it was?

(Objected to as irrelevant.)

The COURT. Let him state what it is, reserving the objection.

32. Q. Go on and state all, and how it happened; if anything was said by Mr. Chouteau, anything said by Maj. MacRee, what you were desired to do, if anything, and what you did do, if anything.

A. I will state this: I was called on by Mr. Chouteau to survey his land under his deed, and at the same time Major MacRee requested me to survey all his land and fix all his corners, which I did, and marked them by large stone corners—all Major MacRee's land—established them permanently; and on the top of the stones I had the letter M cut, to indicate his exterior boundaries.

307 The defendant produces and shows to the witness an old plat, having upon it the words at the foot "Charles P. Chouteau, October 27, 1876," for identification, on it the following words: "The above plat represents a tract of land in St. Louis County, Missouri, as purchased by Pierre Chouteau of Samuel MacRee and Mary, his wife," (the next word mutilated) "69½ acres." "Surveyed by (then an obliteration) "ment," then "w," then "Coote, county surveyor, firm of Coote and Cozens, S. D. land eng'rs," and asks the witness what he knows of that plat; how it happened to be made.

Mr. GIBSON. I object to it as irrelevant and incompetent.

A. This plat is made in my handwriting, and purports to be a report of a survey executed by the firm of Coote and Cozens, surveyors and engineers, of the tract of land sold by MacRee and wife to Pierre Chouteau, and purports to contain 69½ acres within its boundaries. That survey was made in 1847, July and August, and returned in December.

33. Q. State whether, preceding that, you had any interview with Major MacRee and Mr. Chouteau, or either of them.

308 A. I had an interview with Mr. Chouteau and Mr. MacRee at the time Mr. MacRee was here, about this land, with instructions to survey his land and establish his corners.

(Objected to.)

34. Q. Where was that?

A. At my office, corner of 2nd and Pine.

35. Q. What did Mr. Chouteau say to you (I don't ask you for the words) in the presence of Maj. MacRee?

Mr. GIBSON. Was MacRee present at that time, sir?

A. I think he was present at that time. I think he was here on a visit, or something; that is my recollection; I am not positive about it.

36. Q. What was said by Mr. Chouteau in the presence of Maj. MacRee?

A. I do not recollect any of his conversation, more than they both came together and had the land surveyed. We surveyed for each party speedily (specially), and each party paid the account. My books show that. Beyond that I don't know of any particular conversation that happened. They both came and made an order for a survey. I executed it July and August, and in consequence of the warm weather didn't complete
309 or return it until December. I was engaged at the time in road surveying, and didn't complete it.

37. Q. Look on the map, now, and state if you put up any corners, and if so where; I ask you to look on that plat and state whether you put up any corners at *a*, *b*, *c*, and *d*, on any of those places?

A. I put up corners at all of them—stakes and stones—and Maj. MacRee furnished, whenever his corners were in contact with his line, he furnished large, substantial stone corners, with the letter M engraved on the top. Those stone corners exist there to-day, just as they were planted at that time. The stone corners of *b*, *c*, and *d*.

The COURT. What did he say at the office?

A. I say I don't remember any special conversation. I remember the fact, that is all. He made the request in accordance with the wish of the parties.

Mr. GLOVES. Why did you survey—how did you happen to survey Maj. MacRee's land?

A. Because I was ordered to.

38. Q. Who by?

A. By Mr. Chouteau for his land, and Mr. MacRee for his land; they came together.

39. Q. Well, they said that much?

A. They said they wanted the land surveyed, and agreed the land
310 should be surveyed, and I fixed the corners and established them, and gave them both plats, one of which is produced in court.

40. Q. Did you give a copy of that plat to Mr. MacRee?

A. I gave him a copy, not of this one, but containing a plat of his land, *containing a plat of his land*, containing that on it.

41. Q. Did it show where the corners were put?

A. Oh, yes, every time.

42. Q. Which corners, *b*, *c*, and *d*?

A. Yes, *b*, *c*, an' *d*, on this plat, and all other corners belonging to Maj. MacRee. Maj. MacRee had other land beside.

43. Q. Did he claim the tract?

A. Oh, yes, three; he claimed three or four tracts inside of Prairie des Noyers.

44. Q. Went as far west as *d*?

A. Yes, sir.

45. Q. If he had not owned south of that, you would not have gone further than C?

A. No, sir.

46. Q. Were you paid by any body for pulling up the stone corners *b*, *c*, and *d*?

A. Yes, sir; paid for all that work.

47. Q. Who by?

A. By Maj. MacRee and Mr. Chouteau.

48. Q. What did you say was the letter upon the corners *b*, *c*, and *d*?

A. The letter M.

49. Q. What was that for?

A. McRee.

50. Q. Do you know anything about the location of the road in
311 1846–'7–'8, over any part of the Chouteau tract or McRee tract and east of the Chouteau tract?

A. Prior to this survey the western portion of Maj. McRee's property, west of the old Manchester road, was unimproved, uninclosed, in its native condition, and people from the west had no outlet to St. Louis, except through that direction. They had a road—the Sublettes and Bertholds—they came through, and others came over Maj. McRee's land, and travelled along the south end of the inclosure.

51. Q. What land do you mean now?

A. McRee's land in that survey 2498, and also this land in the Prairie des Noyer fields, adjacent to the James Y. O'Carroll's tract; they came from the west across the king's highway, and passed on to the land of Mr. Chouteau, claimed by him, south of his inclosure, which did not at that time extend as far south as his south boundary was established. They travelled eastwardly across his lands till they got near to his east boundary, between him and McRee, then they travelled northwardly to the intersection of the lane that Mr. Chouteau had across his 69½-
312 acre tract; travelled to that intersection of that lane, and came from the west to his house northeast, then a northeast direction by Rock Spring to St. Louis, that was then the travelled road to St. Louis, now called the Market street road.

52. Q. Was there any change in that road in about 1846 '7 or 1848?

A. Somewhere about 1847 I was ordered by the county court to open the king's highway through Mr. Chouteau's land, he owning on the east and west sides of the king's highway.

53. Q. You mean on the 64 acres?

A. West of the 64 acres, between his land in the 64 acres from McRee and his land in the Gratiot league-square tract. I was subsequently ordered by the county court to locate the road on the south, east, and north boundaries of Mr. Chouteau's 64-acre tract, to be located entirely within his boundary lines.

54. Q. Was that done?

A. That was done, fences were removed by my supervision up that line, and travelled for several years.

55. Q. Now, was Maj. McRee out on this ground along the eastern line of the Chouteau 64-acre tract?

A. That I don't remember; he was on his land; but I don't think
313 he followed any of the lines around. I don't think he staid on the premises at all. I met him on the old Manchester road, but I don't recollect of seeing him on any of the boundary lines or corners; he didn't stay to supervise the surveying of it.

56. Q. How long have you known that 64-acre tract?

A. I have known that——

57. Q. I mean the tract of land claimed by Chouteau under Hertzog and McRee?

A. I have known it since about 1833 or 1834.

58. Q. Can you tell me what the value was in 1862?

A. In 1862—I have thought on that subject—in 1862 the land was worth about $500 to $600 an acre; but in 1862 property depreciated in value; was just about as much depreciated, relatively, in value as *there* is to-day; very much depreciated.

59. Q. Will you state what was, in your opinion, the value of the improvements put on that property by Pierre Chouteau in 1862, say including the cultivation or inclosing the orchard, the house, out-houses, barns, stable, and everything?

A. Take all his buildings as they stood in 1862, the new buildings he put up, that brick residence, the additions he made to that barn, inclosures,
and everything built in 1858—he built a new fence all around his
314 his land in 1858; I have a memorandum in my pocket of the
time the fences were put up—I think they were worth $10,000; I think the improvements could not have been put up for less than $10,000.

Mr. GIBSON. I do not desire any of this testimony to go in except under objection.

(So ordered by the court.)

60. Q. At the time that Mr. MacRee and Mr. Chouteau were together in your office, was any allusion made to this road?

A. No, sir; this road cut no figure then at all.

61. Q. Will you state to the court upon what part of this tract of 64 acres the buildings are; whether they are on the south of the south line of Calve, or on the north of the south line of Calve?

A. The old residence and the southern room of the brick buildings, and the spring and the spring-house, are south of Calve. The stables, the old buildings and stables, and one room of the brick row and the spring and spring-house are south of Calve; all the others on the north are north of Calve, north of Calve's south boundary.

62. Q. Is the residence on the Calve tract?

315 A. The residence that is south of Calve, the old mansion is
south of Calve, and one of the brick buildings, one room of the brick building is south of Calve, and the others are on Calve, and the orchard is south of Calve, and part north of his south boundary.

(Defendants offer in evidence an old plat marked on foot, "Charles P. Chouteau, October 27, 1876," for identification, and above referred to.

Objected to as incompetent and irrelevant.

Defendants offer in evidence a plat marked at the top, "Gibson against Chouteau." Plat made by William H. Cozens.

Objected to.)

Cross-ex. of W. H. Cozens.

Cross-examination by Mr. GIBSON:

1. X Q. Mr. Cozens, doen't the line, the south line of the Calve tract, strike precisely the south line of the main brick building put up by

Mr. Chouteau? The houses are frame, are they not? When you came to survey it off, didn't you find the south line of the Calve tract struck precisely the south line of the main brick building?

316 A. My recollection was, it was a brick building, and I struck a division line between the two buildings. I remember I struck exactly a division line between the two buildings.

2. X Q. Now, isn't that exact division line between the brick building and the frame one?

A. It is one building.

3. X Q. And the brick is north, and the frame end of it is south?

A. I thought they were both brick, sir; I thought it was simply a dividing line between the two rooms. It may be possible one is frame and one is brick, but it strikes a dividing line between the two buildings, right through the centre of the wall. The main building, the old residence, is frame.

4. X Q. Isn't all of the building south of the line of the Calve frame, with the exception of out-houses for poultry and things of that kind, and perhaps a little spring-house?

A. That I can't be definite about. I have got a kind of recollection, I know it struck a dividing line between the two buildings; the

317 buildings were built together, and the line of intersection struck between them, and when I went there I made a mark, struck right between the two; whether one is frame or not, I know the row to the north was of brick. I am positive of that, and I thought that they were all brick; it may be frame, but I know this was used as a kind of lumber room.

5. X Q. That on the south?

A. Yes; a lumber-room. He had harness and broken chairs in it, and some gardening implements in it—rakes, spades, and hoes—harness and things of that kind; a kind of lumber-room.

6. X Q. Well, all those buildings on the south, with the exception, perhaps, of a little spring-house and poultry-house, might easily be moved away on the north, couldn't they—frame buildings?

A. Yes; stables, &c., poultry-house, and the spring-house.

7. X Q. Maj. McRee was an officer of the regular Army, was he not?

A. Yes, sir; Maj. McRee was a United States Army officer; I knew him a great many years.

8. X Q. So was his brother William?

Yes; and used to be surveyor-general.

318 9. X Q. Maj. McRee all his life, with the exception of a few months at a time, passed his days away from St. Louis?

A. He did not stay here, he only came here on visits?

10. X Q. Was he ever stationed here, except a few months, before his death in 1849?

A. That is my recollection; he built out on his tract of land, and died of cholera; and his brother William McRee also died on that land.

11. X Q. Both of the cholera?

A. Both died of cholera.

The COURT. In 1849?

A. No, sir; William died many years before Samuel. Samuel McRee acquired that title from his brother William.

Mr. GIBSON. You are confident that survey was made in 1847?

A. I am confident of it, because I see it written on my plats, and the account-book I have also represents the same facts.

12. X Q. Now, don't you know that Colonel McRee was in Mexico in 1847, and down South to New Orleans?

A. I know during the Mexican war he was absent. I know he was in New Orleans in the fall of 1846, because I saw him there, but
319 how long he staid South, residing South, or in the Army, I don't know.

13. X Q. Mr. Archibald Gamble was his agent and Hamilton Gamble his attorney?

A. Yes; Archibald Gamble was his agent; he attended to all his real estate and affairs of that kind.

14. X Q. Maj. McRee, you say, had numbers of claims and tracts of land all there in one body?

A. Yes; one body, except one piece way beyond the river Des Peres, he sold to a man named H. H. Cohen. He used to keep a clothing store here, two years ago, in New York City.

15. X Q. He was not acquainted with the surveys, locations, and things of that kind here, was he?

A. I don't think he was.

16. X Q. Didn't he leave that survey entirely to you, just to survey his land?

A. He came and ordered me to survey his lands; that is all he did say.

17. X Q. You just then did it yourself?

A. Yes, sir.

18. X Q. Didn't Mr. Chouteau have this survey made at that time principally for the purpose of finding out where this road was to be, changing the king's highway?

A. I think it was; I don't know. He wanted this land sur-
320 veyed; wanted his line. It was in the spring of the year. The county sent me out there. I have got the old-field books here—the spring of the year—the county sent me out to locate the king's highway.

19. X Q. That is 1847?

A. It was the 8th of February, 1847, and I made the survey of the king's highway, and in the fall (page 31 of this book), in the interim between February 8th and October 27, 1847, the lands of McRee and Chouteau were surveyed, and the county court had arranged with Mr. Chouteau to divert the *the* road from its original position, king's highway, around his southeast and west boundaries, and on October 27 I completed the survey of the road in accordance with the agreement made between the county court and Mr. Chouteau from his directions.

20. X Q. All that survey and that road there was for the convenience of Mr. Chouteau, as he did not want king's highway opened straight through his other land?

321 A. Yes, because he had some buildings on the road, built across the road, and he didn't wish to pull them down.

21. X Q. He owned all the land west of the 64 acres?

A. West and east of king's highway, and inadvertently he had put out buildings right on the line of the road, and he did not wish to pull them

down. The county court permitted him to go around his line temporarily till such time as they ordered otherwise.

22. X Q. It was at his instance and request that this survey was made?

A. Of his land, of course.

The COURT. That—which survey?

Mr. GIBSON. The old survey given in evidence here.

A. No; his survey, and then, after the settlement of those tracts in December, I made a report to both parties of the result of those surveys?

23. X Q. Didn't you report to Mr. Gamble instead *instead* of Mr. McRee?

A. I don't know; my books don't show.

24. X Q. Did Mr. McRee remain here at all when you saw him in 1847?

A. No, sir.

25. X Q. You have no recollection of ever giving that survey to him, have you?

322 A. No; I have not. I know I got paid for it in December.

26. X Q. You remember you were paid for it, and that is all the recollection you have about it?

A. Yes; in December.

27. X Q. You don't remember of giving that survey to any one at all?

A. No; I don't recollect distinctly who I handed it to.

28. X Q. You find on your books that survey was marked as paid by an entry of that?

A. On my plats; the survey was made in July and August, and the return was made in December, and when I look over my field-books, I now see the reason that the delay in the return was made because in surveying this line also the roads had to be located and determined. I did not complete that until October.

29. X Q. Maj. McRee was not here?

A. I don't know that fact.

30. X Q. Now, in point of fact, was not the ascertainment of where his lands were, and this, that, and the other of choice, a thing of your own, as a gentleman entirely familiar with all those claims?

A. Yes; well, I suppose he trusted me considerably as a profes-

323 sional expert. I don't know of any special instructions either from him or Mr. Chouteau. I don't remember any special instructions except they both confided in me because whatever certificate I gave the ground I surveyed was Mr. Chouteau's according to the deed.

31. X Q. In making that survey you made that survey according to the deed of Wash to Chouteau and McRee to Chouteau?

A. Yes, sir.

32. X Q. That is the whole thing from beginning to end?

A. Took the course of the boundary called for.

33. X Q. That is all you intended to do?

A. Yes, sir.

34. X Q. These stones you put down, you put them in your bill, and got paid for?

A. Yes, sir.

35. X Q. All the improvements you speak of were there when you made the survey, were they not?

A. Which improvements?

36. X Q. Of Mr. Chouteau's?

A. He resided out there.

37. X Q. They were there long before?

A. Long before that. I knew him to be there in the year '33, 1834, '5, '6. All those houses, stables, orchards, wells and things, most all of
324 them he built from time to time, but his residence was there, spring-house, stables, and things of that kind, he always made more or less improvements.

38. X Q. His orchard was there, too?

A. Yes, sir.

39. X Q. In 1847?

A. This plat shows that.

40. X Q. That they were there long before that?

A. Yes; shows where the orchard was.

41. X Q. Mr. Chouteau took possession of some 69½ acres?

A. 69½ acres. The way he got 69½ acres in the place of 64, he got a greater length than is called for in his deed.

42. X Q. (Mr. GIBSON.) You mean than called for in those deeds to him?

A. Yes; just took those deeds, and took those calls in those deeds.

43. X Q. (Mr. SHEPLEY.) You mean north and south?

44. X (Mr. GLOVER.) Greater length in what direction?

A. The greatest length from north to south is where he gets his excess.

45. X (Mr. GIBSON.) What was Mr. Chouteau's occupation; what business did he follow?

A. He was an Indian trader—traded with the Indians. He was the head of the American Fur Company.

46. X Q. He was very familiar with lands and things about St. Louis?

A. Yes, sir.

325 47. X Q. Owned a great deal of it, and attended to it pretty sharp?

A. Yes, he was a man that bought and sold a great deal of real estate himself.

Re-ex. of Cozens.

Re-examination by Mr. GLOVER:

63. X Q. At the time that Mr. Chouteau and Mr. McRee were in your office together, was anything said about the dividing line between *between* them in 1847?

A. I cannot recollect any conversation at all.

(Objected to as not being in rebuttal.)

Mr. GLOVER. You have asked the witness to say that Mr. McRee did not know anything about this survey, and I am replying to that.

Mr. GIBSON. The gentleman asked the witness what passed at that time, and he said he did not remember anything at all.

The COURT. I think that *that* has been gone over, but I will let it go on.

A. I do not recollect any conversation.

64. Q. At the time you were engaged in the making of the survey of

the eastern line of the 64-arpen tract, which is the western line of
326 Mr. McRee in respect to the James Y. O'Carroll tract, when you were surveying that, was there anybody along as a representative of Samuel McRee; any man of business or agent, Mr. Gamble or anybody else?

(Objected to; objection overruled.)

A. I stated I did not remember. I don't think that any person followed us around on the surveys. I employed my own assistants, and I don't think any person supervised or assisted me or aided me in making those surveys. All I know is this: I did see Maj. McRee out there on the road one day on horseback; rode out there; and he came out, I suppose to see his own tenants or something of the kind. I met him there. I was in the vicinity of the road when he came out and he spoke to me.

65. Q. Have you any memorandum or business-book showing to whom you delivered the plat of McRee's survey of the O'Carroll tract?

A. No, sir; I have not, was not then in the habit of doing it.

327 Plaintiffs then read copy of deed from S. McRee and wife to Lucas and Hunt, dated November 4, 1845, as follows:

Deed from S. McRee & wife to Lucas & Hunt, Nov. 4, 1845.

This deed made and entered into this sixteenth day of October, in the year eighteen hundred and fifty-five, by and between Samuel McRee, of the United States Army, and Mary McRee, his wife, of the first part, and James H. Lucas and Anne L. Hunt, both of the city and county of St. Louis and State of Missouri, of the second part, witnesseth:

That for and consideration of the sum of one dollar in hand well and truly paid by the said party of the second part to the said party of the *second* part, the receipt of which is hereby acknowledged, the said party of the first part has granted, sold, transferred, and forever quitclaimed, and does by these presents grant, sell, transfer, and forever *grant* claim, unto the said party of the second part, and to their heirs and assigns forever,

all the right, title, claim, interest, and estate of the said party of
328 the first part in and to the following described tract of land, situated, lying, and being in the county of St. Louis, and being part of a tract of fifty acres and fifty-seven hundredths of an acre, surveyed for Amable Guion or Veuve Lecompte's legal representatives, survey number 2973, to wit: Beginning at a stone set on the southern boundary of said track 29 chains and forty links westward of the southeast corner of said survey No. 2973, thence north 74° 8′ west forty-two chains and 46 links to the eastern boundary of a part of said tract conveyed by the party of the first part to Pierre Chouteau; thence north 9° 10′ east five chains 87 links to a stone on the northern boundary of said tract; thence south 74° 8′ east along the northern boundary of said tract 43 chains and 9 links to a stone set 29 chains 40 links from Chouteau's line upon which the said survey No. 2973 corners; thence south 15° west five chains 84 links to

the beginning, containing the quantity of twenty-four acres and
329 ninety-seven hundredths. To have and hold the said granted and sold premises, together with all the rights, privileges, and appurtenances thereto belonging, unto the said James H. Lucas and Anne L. Hunt, their heirs and assigns forever.

In witness whereof the said Samuel McRee and Mary, his wife, have hereunto set their hands and seals at the city of St. Louis, this day and year above written.

S. McREE. [SEAL.]
MARY McREE. [SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this 17th day of October, in the year one thousand eight hundred and forty, personally appeared before the undersigned justice of the county court of the county of St. Louis, the *the* above-named Samuel MacRee and Mary MacRee, his wife, both personally known to me to be the persons whose names are subscribed to the foregoing deed as parties thereto, and severally acknowledged the same to be their act and deed for the purpose, therein mentioned, and the said
330 Mary McRee being by me examined separate and apart from her said husband, and the contents of said deed being by me explained to her, made her acknowledgment that she executed the same freely and voluntarily, and without the compulsion or undue influence of her said husband, and relinquishes her dower to the real estate thereby conveyed.

Taken and certified the day and year above written.

ARCHIBALD GAMBLE,
Justice C. C.

Filed and recorded December 10th, 1845.

S. D. BARLOW, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned recorder for said county, certify that the foregoing is a true copy of an instrument of writing executed by S. MacRee, together with the acknowledgment thereof, as fully as the same appears of record in my office, book V[3], page 383.

Witness my hand and official seal this 16th day of September, A. D. 1876.

D. H. MAC ADAM, *Recorder.*

331 And produced as a witness Charles P. Chouteau, who testified as follows:

Testimony of C. P. Chouteau.

CHARLES P. CHOUTEAU, sworn and examined on the part of the defendants, testified as follows:

Examination by Mr. GLOVER:

1. Q. Are you one of the defendants in this suit?
A. I am.
2. Q. What relation do you sustain to Pierre Chouteau, junior?
A. My father.

(The defendant produces and shows to witness an old plat with the words "Charles P. Chouteau, October 27, 1876," for identification, on the plat referred to, and asks him what he knows of that plat.)

A. This plat was made at my instance——

(Objected to.)

A.—from the fact that Maj. McRee one day observed to me that he thought——

Mr. NOBLES. I object.

A.—that we were trespassing.

(Objected to.)

The COURT. It can go in subject to objection.

Mr. GIBSON. Maj. McRee is dead, died in 1849; that is already testified to.

The COURT. You object on the ground that one of the parties is dead?

(Witness continued.) That my father was trespassing on his land in the location of the road. I ascertained the boundary of the tract of
332 land sold by Maj. McRee to Mr. Chouteau.

3. Q. Go on and state all that was said.

A. Well, I can only give the substance; let me see if I can recollect all the substance of the conversation. It was to the effect that it would be well to have the whole of this line properly located.

4. Q. What line?

A. Between his land and Mr. Chouteau's.

5. Q. What land and Mr. Chouteau's?

A. This 64 acres. Mr. Chouteau some years previous had obtained permission from the county court to close the king's highway on condition that he made a road all around that tract which he had purchased from Maj. McRee, 64 acres. That line was located, at least the fence was made, leaving about 40 acres westward of Mr. Chouteau's true iine, leaving a road all around the whole of Maj. McRee's property on the eastward of this tract.

6. Q. What tract?

A. The 64 acres. It was vacant, wild land, none of it in cultivation. The fact is, there was a lane which divided this 64 acres from north
333 to south, and the travelled road was directly from this, kept northeastward until we came near to Dr. Barritt's late residence near the Rock springs, so that all the lines of the lands being by stakes and so on had entirely disappeared.

7. Q. Well, what was done then in regard to the lands, if anything?

A. They were surveyed, sir, by mutual agreement. Messrs. Cootes and Cozens were to lay off all those lines, which they did in the year 1847. I think he was ordered to do it some time in the summer of 1847, and he failed to do it till—I think it was in December that he brought this map to me, and I paid him for it; at least I gave him an order on Pierre Chouteau, jun., & Co.

8. Q. You saw Mr. Cozens?

A. I did.

9. Q. Well, sir, was anybody present?

A. Maj. McRee was present.

10. Q. Well, what was said to Mr. Cozens, either by you or Mr. McRee, or either of you in the presence of the other?

A. In substance——

Mr. GIBSON. We object to that. In the first place, the witness talks of the substance and not of what did transpire.

A. When I say that, I was Mr. Chouteau's agent; I was looking

334 after all his property, and the object was to establish our true lines and to ascertain whether in fact we were trespassing.

(The court sustained the objection.)

11. Q. State what was said—let us see what the object was, by stating what was said—not give your conclusions—state what was said without the object to Cozens, or Cootes and Cozens.

A. He was in the office; I think it was Mr. Cozens that I had the conversation with.

12. Q. Go on and state the words if you recollect them, if not, the substance?

A. I can simply give you the substance that Cootes and Cozens were ordered to survey this land—this 64 acres—Maj. McRee being under the impression at the time——

Mr. GIBSON. Never mind stating that.

13. Q. What did he say?

A. Who say?

14. Q. Maj. McRee; if you had an impression, you have got it from something he said.

A. He wished him to survey this land.

(Objected to.)

The COURT. State what he said; not give any impression at all.

A. Maj. McRee ordered Cootes and Cozens to go ahead and sur-
335 vey these lands.

15. Q. Survey what lands?

A. First, it was a mutual agreement, my land or Mr. Chouteau's land—64 acres was to be set apart and to survey the balance.

Mr. GIBSON. We want to know what was said?

A. I cannot give you the exact words, but the substance.

The COURT. That was said?

A. That was said. He ordered——

The COURT. To survey the 64 acres and what else?

A. And the balance of his lands.

16. Q. Well, was it done?

A. I know it was done in Mr. Chouteau's case. I got the map and paid the bill.

17. Q. Did you know where the line was located after it was done?—The eastern line of 64-acre tract?

A. It was located east of the road which then run round this 64-acre tract.

18. Q. After it was located, where did the road appear to be, east or west of the eastern line of the 64-arpent tract?

A. It was west of the stone set by Mr. Cozens.

19. Q. What was west?

A. The road was west.

Cross-ex.

Cross-examination:

1. X Q. That survey was made for Mr. Chouteau, wasn't it, altogether?

336 A. Well, this one was made for Mr. Chouteau.

2. X Q. That never was shown to Samuel McRee, or any other person, was it?

A. That I don't know. I cannot answer that question.

3. X Q. You don't know whether it was or not?

A. I don't know.

4. X Q. You were examined in the case of Gibson against Chouteau when it was tried?

A. I was.

Mr. GLOVER. I do not remember that I have anything else. If I have omitted anything, I will ask leave to put it in.

The COURT. Is that your case?

Mr. GLOVER. Yes, I think so, at present; it don't occur to me that I have forgotten anything.

Mr. GIBSON. We want the case closed.

The defendant, Charles Gibson, then read in evidence the record and proceedings in the case of Gibson vs. Chouteau, in the St. Louis land court, as follows:

Record in case Gibson vs. Chouteau.

RECORD.

STATE OF *St. Louis*,
County of St. Louis, ss:

Be it remembered, that on the twenty-third day of September, in the year of our Lord one thousand eight hundred and sixty-two,
337 there was filed in the office of the clerk of the St. Louis land court a petition, which petition is in the words and figures following, to wit:

In the St. Louis land court, October term, 1862, St. Louis County, Mo.

CHARLES GIBSON, PLAINTIFF,
vs.
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook, defendants.

Plaintiff makes the following statements:

1st. That the defendants were on the twentieth day of August, eighteen hundred and sixty-two, in possession of the following real estate in the county of St. Louis, to wit:

All that portion of United States private survey number twenty-four hundred and ninety-eight, in the name of James Y. O'Carroll, or his legal representatives, which is bounded west and north by the out-boundary lines of said survey and east by other portions of said survey, now and then in the possession of Mrs. Mary MacRee and her tenants, and south by United States survey 1286 and 1289, in favor Jeannette, and which por-
338 tion contains sixty-four acres, more or less.

2nd. That Mrs. Mary MacRee was prior to said 20th of August, 1862, invested by the United States with the title to said premises, and, being so invested with the title thereto, conveyed the same to the plaintiff.

3rd. That the plaintiff was on the 20th day of August, 1862, entitled to the possession of said premises, and being so entitled to the same the said defendants unlawfully entered into possession thereof, and unlawfully detained the same from the plaintiff, to his damage in the sum of three thousand dollars; that the monthly rents and profits of said premises are of the value of seventy dollars.

Wherefore plaintiff asks judgment for possession of said premises, and for three thousand dollars damages for the unlawful withholding of the same, and for said monthly rents and profits.

JAMES R. LACKLAND AND
JOHN FLOURNAY,
Attorneys for Plaintiff.

STATE OF MISSOURI,
County of St. Louis:

339 John Flournay, one of the plaintiff's attorneys, being duly sworn, says that the foregoing petition and the matters therein as stated he believe' to be true.

JOHN FLOURNAY.

Subscribed and sworn to before me this 23rd day of September, A. D. 1862.

ROBERT WHITE, *Clerk,*
By CHARLES LEVY, *Deputy.*

Upon the filing of the above petition the clerk then issued to the sheriff of St. Louis County a summons, which summons is in the words and figures following, to wit:

Summons.

THE STATE OF MISSOURI,
County of St. Louis, ss:

To the sheriff of St. Louis County, greeting:

We command you to summon Pierre Chouteau, jr., Charles P. Chouteau, and John Cook to appear before the judge of our St. Louis land court on the first day of the next term thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the second Monday of October next, then and there to answer the complaint of Charles Gibson set forth in the annexed petition; and have you then and there this writ.

340 Witness Robert White, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this twenty-fourth day of September, in the year of our Lord eighteen hundred and sixty-two.

[SEAL.]

ROBERT WHITE, *Clerk,*
By CHAS. LEVY, *Deputy.*

Upon which summons the sheriff made his return in the words and figures following, to wit:

Sheriff's return.

Executed this writ in the county of St. Louis on the 25th day of September, 1862, by leaving a copy of the writ and petition, as furnished by the clerk, at the usual place of abode of Charles P. Chouteau, with a white person of his family over the age of fifteen years, and by leaving a copy of this writ, as furnished by the clerk, at the usual place of abode of Pierre Chouteau, jr., with a white person of his family over the age of fifteen years and by delivering a copy of this writ, as furnished by the clerk, to John Cook.

JOHN H. ANDREWS, *Sheriff*,
By A. R. ROSS, *Deputy*.

341 And afterwards the following proceedings were had in this cause, to wit:

Answer of John Cook.

FRIDAY, *December 12th*, 1862.

October term, 1862.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL.

Answer of John Cook filed in this cause, which answer of John Cook is in the words and figures following, to wit:

In the St. Louis land court, to October term, 1862.

CHARLES GIBSON, PLAINTIFF,
vs.
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and JOHN COOK, defendants.

The said defendant, John Cook, comes, and for answer to said petition says that he had not at the commencement of this suit, has not now, and never had any interest in the premises mentioned in the petition, either by possession or other claim of title; and defendant disclaims any interest in this controversy, and denies that he unlawfully, or any other way, detains the premises from the plaintiff, and says that he is improperly
342 made a defendant, because he has no interest, and claims none, in the said premises, and never had any interest, and never claimed any before or since the commencement of this suit.

HILL AND BURWELL,
For Def'ts.

The above defendant, John Cook, on oath says that the foregoing answer, and the matters and things in the above answer as therein stated, are true to the best of his knowledge and belief.

JOHN COOK.

Sworn to and described before me this day of December, 1862.
As witness my hand and official seal.
[SEAL.] E. H. VORDTRIEDE,
Notary Public, St. Louis County, Mo.

And afterwards the following further proceedings were had in this cause, to wit:

On motion, amended answer of Pierre Chouteau filed by leave of court.

March term, 1863.

WEDNESDAY, *April 29th*, 1863.

343 CHARLES GIBSON
vs.
PIERRE CHOUTEAU ET AL.

Now at this day there is filed in this cause a motion for leave to file an amended answer in this cause, and the same being submitted to the court it is ordered that the defendant Pierre Chouteau, jr., have leave to file an amended answer. And thereupon the amended answer of said defendant is filed in this cause; which amended answer of Pierre Chouteau, jr., is in the words and figures following, to wit:

Amended answer of Pierre Chouteau, jr.

In the St. Louis land court, October term, 1862.

CHARLES GIBSON, PLAINTIFF,
vs.
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and JOHN COOK.

The said defendant, Pierre Chouteau, jr., impleaded with Charles P. Chouteau and John Cook, for his separate answer says that he denies that he unlawfully withholds from the plaintiff the possession of said premises; he denies that the plaintiff is entitled to the possession of the said premises, or any part thereof; and defendant denies that he, defendant, was
344 ever jointly in possession of said premises with the defendants Charles P. Chouteau and John Cook, or either of them; and he denies that the said Charles P. Chouteau and John Cook, or either of them, ever were or are now in possession of said premises, or of any part thereof.

Defendant denies that the plaintiff, on the 20th day of August, 1862, or at any other time, was entitled to the possession of said premises, and that said defendant unlawfully entered into possession thereof.

Defendant denies that on or prior to the 20th day of August, 1862, the said Mrs. Mary MacRee was invested by the United States with the title to the premises sued for or *signed* thereof.

Defendant has no knowledge or information sufficient to form a belief whether the said Mary *Mary* MacRee conveyed the said premises to the

plaintiff or not, and he requires proof thereof, as though this allegation of the petition was denied.

345 And defendant has no knowledge or information sufficient to form a belief as to the deeds under which plaintiff claims title, and requires full and strict proof of the entire title of the plaintiff through each link in the chain of his alleged title.

This defendant further says that he has had and held possession, open, notorious, continued, and uninterrupted, of the premises in the petition described, claiming them as his own adversely to all persons for more than ten years before the commencement of this suit, and the plaintiff is barred in this action by the statute of limitations, and the title of this defendant is perfect by the said statute, which this defendant here plea's and relies on in bar of this action.

And this defendant further says that the right, title, and interest of the said plaintiff which he claims or pretends to have in said premises, and all and every deed which he may produce and show in support of such title and claim, if any such he may produce and show, were acquired and obtained by the said plaintiff as agent or attorney of and for

346 this defendant, and for the use of; and in trust for this defendant and defendant says that each and every deed for said premises, or any part thereof, under which the said plaintiff claims or pretends to claim said premises, were procured and obtained by said plaintiff while acting as agent and for this defendant, and such deeds were fraudulently and wrongfully made to said plaintiff by his procurement in violation of the rights of this defendant, instead of to this defendant, as of right they should have been.

And defendant denies that by virtue of any such deed or conveyances, in any form, any right of title vested or could vest in the said plaintiff to the prejudice of this defendant; and defendant denies that plaintiff can or ought to maintain this suit, and be allowed to use such deeds in evidence in support of his pretended title to the premises.

And this defendant says he and those through whom he claims

347 title have been in the open, notorious, and continuous possession of the premises in question, claiming them adversely to all other persons, for about forty years next before the commencement of this suit; and defendant says the plaintiff is barred by lapse of time and laches from claiming any equitable relief, by location or otherwise, within the land located as 640 acres, No. 150 of New Madrid location, in St. Louis County, State of Missouri.

HILL AND BURWELL,
Attorneys for Defendants.

STATE OF MISSOURI,
County of St. Louis, ss:

Charles P. Chouteau, agent, and the defendant Pierre Chouteau, jr., being duly sworn on his oath, says that the foregoing answer and the matters therein as stated he believes to be true.

CHARLES P. CHOUTEAU.

Sworn to and subscribed before me this 28th day of April, A. D. 1863. Witness my hand and notarial seal.

[SEAL.]

E. H. VORDTRIEDE,
Notary Public, St. Louis County, Mo.

And afterwards, to wit, at the same time, the following further
348 proceedings were had in this cause, to wit:

Reply to third answer of Pierre Chouteau, jr., filed.

FRIDAY, *May* 1*st*, 1863.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL.

Reply to third answer of Pierre Chouteau, jr., filed in this cause, which reply is in the words and figures following, to wit:

In the St. Louis land court.

CHARLES GIBSON, PLAINTIFF,
vs.
PIERRE CHOUTEAU, JR., ET AL., DEFENDANTS.

The plaintiff, by leave of court, files the following reply to so much of the third answer of Pierre Chouteau, jr., as sets up new matter not responsive to the petition in this case:

The plaintiff is unable to reconcile the statement in the answer that said defendant "had no knowledge or information sufficient to form a belief as to the deeds under which the plaintiff claims," with the averment in the answer that "each and every deed under which the said plaintiff
345 claims or pretends to claim said premises were procured and obtained by said plaintiff while acting as agent for this (said) defendant."

The plaintiff is surprised that even Mr. Chouteau should in one and the same affidavit swear that he believes both of these averments to be true.

The plaintiff denies that he is barred of this action by the statute of limitations or that the title of said defendant is perfect by said statute.

The plaintiff denies that the right, title, and interest which he claims and pretends to have in said premises, or any deed which he will produce or show in support of such title or claim, was obtained by him as agent or attorney of and for said defendant.

As to the allegations that each and every deed, or any part thereof, under which said plaintiff claims or pretends to claim said premises was procured by said plaintiff while acting as agent of said defendant, and that such deeds were fraudulently and wrongfully made to said plaintiff by his procurement, in violation of the rights of said defendant, instead of to said defendants, the plaintiff says the same is utterly and absolutely
350 false.

The plaintiff has no knowledge or information sufficient to form a belief as to whether the said defendant has been in possession of said premises for forty years, as alleged, and therefore denies the same.

The plaintiff denies that he has been guilty of any laches, or is or ought be barred by any lapse of time or laches from claiming such relief as he may be entitled to in this case.

The plaintiff states further that after the said Pierre Chouteau had filed his first answer to the plaintiff's petition, in which he makes general charges against this defendant similar to those in this his third answer, he requested leave, and the court granted him leave, to file a more specific answer.

That said defendant thereupon filed an answer and cross-bill, in which he made a detailed and specific statement of all his charges against the plaintiff; and thereupon the plaintiff filed a reply specifically and
351 in detail to said allegations of said Pierre Chouteau.

The said plaintiff further says that said defendants, well knowing that said allegations were false and slanderous and could not be supported by proof, obtained permission of this court to file a third answer for the purpose of avoiding a specific statement of his charges, and to fall back upon vague and general charges contained in his first answer; and the plaintiff, believing that the defendant has abused the leave granted him by the court in thus acting, under these circumstances prays to be permitted to refer to his reply to said second answer as if the same was incorporated herein, and as a specific statement on his part of the matters therein contained; and inasmuch as said reply was full and particular, he deems a general reply to the general charges in this third answer sufficient.

C. GIBSON.

ST. LOUIS COUNTY:

Charles Gibson, being duly sworn, says he believes the matters in the above reply as therein stated are true.

352 C. GIBSON.

Sworn to and subscribed before me this 1st day of May, A. D. 1862.

ROBERT WHITE, *Clerk*,
By E. P. WALSH, *Deputy*.

The reply to said second answer, as if the same was incorporated herein, referred to in the above and foregoing reply, is in the words and figures following, to wit:

Reply to second answer.

In the St. Louis land court, October term, 1862.

CHARLES GIBSON, PLAINTIFF,
vs.
PIERRE CHOUTEAU ET AL., DEFENDANTS.

The plaintiff, by leave of court first obtained, files this his reply to the so-called cross-bill filed by Pierre Chouteau in this case, reserving all exceptions to the right of the defendant to file any cross-bill in the cases, and also to the sufficiency of said bill:

The plaintiff emphatically denies that the right, title, and interest of the plaintiff, and which he claims and pretends to have in said
353 premises, and on which right, title, and interest this suit is brought, were acquired by said plaintiff as agent and attorney for said Pierre Chouteau, or for the use of said Pierre Chouteau. The plaintiff denies

that each and every deed, or any deed whatever, for said premises, or any part thereof, under which said plaintiff claims or pretends to claim said premises, were procured or obtained by said plaintiff while acting as agent and attorney of said Pierre Chouteau. And as to the charge that said deeds were fraudulently or unlawfully made to said plaintiff by his procurement, instead of to the defendants, the plaintiff says the same is utterly and absolutely false. And in this connection the plaintiff says that he never had any personal acquaintance with said Pierre Chouteau; that he never was employed by him or by any one for him to act as his counsel, attorney, or agent in regard to said title or said premises, or in any other matter whatever; that he never received any money, or anything whatsoever, nor any promise or obligation whatsoever, from said Pierre
354 Chouteau, or any one acting for him, in regard to said premises or the title to the same, or in regard to any other matter whatever.

The plaintiff denies that said Holmes brought actions of ejectment against said Mrs. Mary MacRee and P. Chouteau, or their tenants.

He denies that the attorneys of said Mrs. McRee and P. Chouteau united or aided each other in the defense of said suits in the year 1855 or 1856.

He denies that in consultation between the plaintiff and attorney of said P. Chouteau, for the purpose of more effectually defending or providing for the defense of the said MacRee and Pierre Chouteau, it was deemed advisable for the said MacRee and Chouteau to buy in claims and procure deeds from certain persons supposed to be the heirs of one Peteo Ruddle and George Dameron, to aid them in their defense, and that the said plaintiff was agreed upon and selected by the said Chouteau and
355 MacRee as a suitable person to entrust with the duty, trust, and agency of procuring certain deeds from the supposed heirs of said George Ruddle and George Dameron, for the sole use and benefit of MacRee and Chouteau, to the extent of their several and respective possessions of the lands included within the John (James) Y. O'Carroll's New Madrid location, including the premises in dispute, or that the same was ever owned by Chouteau.

The plaintiff denies that he was ever furnished moneys by said MacRee and Pierre Chouteau to enable him to perform and execute said alleged trust and agency for the procuring of said deeds.

The plaintiff denies that he ever did, under said alleged employment or as agent or attorney, as alleged, of said Pierre Chouteau and Mrs. Mary MacRee, procure any deed or deeds to the premises in dispute, or that he ever sought to have procured any deed to be made to the said Pierre Chouteau.

The plaintiff denies that he pretends or ever pretended that he was acting in the procurement of any deeds from the heirs of Ruddle
356 and Dameron for himself and his own benefit, but he denies that he ever acted for the benefit of said P. Chouteau in the procurement of said deeds. He will hereinafter explain how and for whom he acted in this matter. He denies that the title he claims, or that any deed or deeds under which he claims, was acquired by virtue or under the alleged trust and agency aforesaid, or that he has no right or title except what was acquired as alleged, or that any of his acts and doings were against equity and good conscience.

The plaintiff denies that the said P. Chouteau has always been ready and willing to pay all or any money expended by the plaintiff in and about the acquisition of said titles or to account with the plaintiff, or that said Pierre Chouteau ever pretended, until the filing of this cross-bill, that the plaintiff had ever received any money from him, said P. Chouteau, or any one acting for him, for the purpose alleged or for any purpose
357 whatever, or that he ever undertook, promised, or agreed to pay him any.

The plaintiff says that the following is a correct statement of his connection with said suits in ejectment, the lands of Mrs. MacRee, and the procuring of the deeds made to him by the heirs of George Ruddle and George Dameron, so far as relates to the controversy regarding said premises in dispute: Colonel Samuel MacRee died in 1849, leaving to his widow a large and valuable estate in lands, which had been in the undisputed possession of himself and those under whom he claimed for more than twenty years before his death. His widow knew nothing of the nature of the title to this property, and her children were then mere boys, incapable at that time of understanding business.

Shortly after the death of Col. MacRee a number of suits were brought for the purpose of ousting Mrs. MacRee of her said lands, and among the number was one by Charles P. Chouteau and others, who claimed under the said P. Chouteau and others for a tract of great value, and in-
358 volving the title to the homestead of Mrs. MacRee. Under these circumstances the said Mrs. MacRee employed the plaintiff as her counsel and attorney to do all things necessary or useful in the defence of any cases brought into this court. Acting under the authority thus conferred upon him, the plaintiff employed H. R. Gamble, H. S. Geyer, and Edward Bates to assist him in the defence of the ejectment suits brought by Peter H. Holmes. Mrs. MacRee paid to Governor Gamble $3,500, to Senator Geyer $1,500, and to Hon. Edward Bates $500 for their services in defending these cases, exclusive of large amounts to the plaintiff.

The plaintiff on many occasions requested Messrs. Shepley and Hill, who appear'd for said Chouteau in the cases brought against him by said Holmes, to pay his fair proportion of the fees paid Messrs. Gamble, Geyer, and Bates, and the necessary costs of trial, &c., but he neither did nor would pay the same, but, on the contrary, has from the commencement of said litigation "skulked" behind Mrs. MacRee, and thus escaped
359 both costs and counsel fees.

The counsel of Mr. Chouteau, though learned and able, had little experience in old-land litigation compared with said Gamble, Geyer, and Bates. They took notes of points made upon the various trials, learnt the views, &c., of those Nestorian members of the bar, but rendered no assistance, and could render none, in the preparation or trial of Mrs. MacRee' cases.

During the first trial of these ejectments in the circuit court of the United States in 1856, the plaintiff suggested to Mr. Shepley, one of Chouteau's counsel, that neither MacRee nor Chouteau had any title to said premises as matters then stood, and that the title of the heirs of Ruddle ought to be purchased by them. This was a few hours after the deed of George Ruddle, under which both MacRee and Chouteau claimed, had been excluded by the court. The plaintiff mentioned this conversation to

his principal, Mrs. MacRee, and she positively refused to have any connection whatever with Chouteau under any circumstances, on ac-
360 count of the Chouteau suit against her and the disgraceful circumstances under which it was brought by them against her. The said conversation was merely casual, during a trial in court, and neither Mr. Shepley nor plaintiff were authorized to act for Chouteau or MacRee respectively. Shortly thereafter the plaintiff discovered that said Chouteau intended to "skulk" in the defence of said suits, and he ceased to have any further communication with his counsel in regard to the cases. The above was the only conversation he ever had in regard to the purchase of said titles with any one claiming to act for Chouteau. About this time the plaintiff proceeded, under the directions of Mrs. MacRee, and with her money or moneys advanced to her by the plaintiff, and charged at the time to her, to buy up, and did purchase, said titles for her use and benefit alone. The plaintiff never pretended to purchase the same for his own benefit, but had the deeds made to himself at the request and by understanding of
361 Mrs. MacRee. After the purchase of said titles by the plaintiff for the use of Mrs. MacRee, and about the time the supreme court of Missouri decided the case of Chouteau and others vs. Mrs. MacRee to be both immoral and illegal, the said Mrs. MacRee, out of consideration of the unusual fidelity *to* the plaintiff to her in all of her affairs, and especially in defending her against the efforts of said Chouteau and others unjustly to deprive her of her homestead, and under circumstances that justly aroused her indignation, voluntarily gave and granted the title thus purchased to that portion of the O'Carroll tract embraced in the premises in dispute, together with other valuable real estate, to the plaintiff.

The plaintiff, however, in the year 1857, moved by the generosity of his client, and desiring to settle the costly litigation then greatly oppressing her, notwithstanding he had no personal interest in her estate or property, but on the contrary was by said litigation receiving large fees, proposed in writing to Mr. Shepley, counsel for Chouteau, that he would con-
362 vey the title thus vested in him to Chouteau provided the case of Chouteau and others vs. Mrs. MacRee was not prosecuted further, and the title set up against her in that case was vested in her, said Chouteau to pay his proportion of the cost of the purchase of said titles from the heirs of Ruddle and Dameron, and the fees in court which he ought to have paid. Said Chouteau expressed himself as willing to compromise by paying his portion of the title claimed to Mrs. MacRee's homestead, but he was unwilling to obtain the whole title. Said Gibson spent considerable time and labor in endeavoring to persuade the other plaintiffs to desist from prosecuting Mrs. MacRee, but did not succeed in doing so. He warned said Chouteau at the time against permitting said suit to be further prosecuted, and that if he did so he would himself be prosecuted for the premises in dispute. This proposition of said plaintiff was not accepted. On the contrary, the said case of Chouteau and others vs. MacRee,
363 notwithstanding the supreme court of this State had decided it to be immoral, was appealed to the Supreme Court of the United States, and the defense of this appeal cost Mrs. MacRee one thousand dollars paid M. Blair and fifteen hundred dollars, or thereabouts, paid H. R. Gamble, fees of counsel.

The judgment of the supreme court was affirmed by the Supreme Court

of the United States, and it is under these circumstances, and after the affirmance of this judgment, that it is claimed that said titles were bought by the plaintiff for the use of Chouteau, and with his money.

The plaintiff especially required proof as to the amount of money paid or delivered to him by Pierre Chouteau, jr., when paid or delivered, or agreed to be paid or delivered, what compensation the plaintiff was to receive from said Chouteau, and all the circumstances of such alleged employment.

The plaintiff says his client, Mrs. MacRee, having positively declined to have any transactions, under any circumstances, with Chouteau, on account of the suit of Chouteau against her and the circumstances under
364 which it was brought, it would have been a breach of the trust and confidence reposed in him by Mrs. MacRee for him to have undertaken to act for said Chouteau.

The plaintiff voluntarily agreed, in case of his recovering in this action with Mrs. MacRee, to refund her the costs and fees paid by her in said case of Chouteau and others against her and her other cases.

The plaintiff says that said cases of Holmes are still pending, and the said Chouteau is still skulking as aforesaid.

CHARLES GIBSON.

STATE OF MISSOURI,
County of St. Louis:

Charles Gibson, being duly sworn, says the matters in the above reply as therein stated are true.

CHARLES GIBSON.

Subscribed and sworn to before me this 10th day of April, A. D. 1862.
ROBERT WHITE, *Clerk,*
By CHAS. LEVY, *Deputy.*

And afterwards, to wit, at the same term, the following further proceedings were had in this cause, to wit:

365 Answer of Charles P. Chouteau filed.

FRIDAY, *May* 1*st*, 1863.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL.

Answer of Charles P. Chouteau filed in this cause, which answer of Charles P. Chouteau is in words and figures following, to wit:

Answer of Charles P. Chouteau.

In the St. Louis land court, October terms, 1862.

CHARLES GIBSON, PLAINTIFF,
vs.
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and JOHN COOK, defendants.

The said defendant, Charles P. Chouteau, comes, and for answer to said

petition says that he had not at the commencement of this suit, has not now, and never had any interest in the premises mentioned in the petition, either by possession or other claims of title; and defendant now disclaim any interest in this controversy, and denied that he unlawfully or in any other way detains the premises from the plaintiff, and says that he is improperly made a defendant, because he says he has no interest and
366 claims none *is* said premises, and never had any interest, and never claimed any before or since the commencement of this suit.

HILL & BURWELL,
Attorneys for Def'ts.

The above defendant, Charles P. Chouteau, on oath, says the foregoing answers and things in the same as therein stated are true, to the best of his knowledge and belief.

CHARLES P. CHOUTEAU.

Sworn to and subscribed before me this 28th day of April, 1863.
[L. S.] E. H. VORDTRIEDE,
Notary Public, St. Louis County, Mo.

And afterwards the following proceedings were had in this cause, to wit:

Jury waived, trial begun, verdict for Charles P. Chouteau, and trial continued.

October term, 1862.

WEDNESDAY, *Nov.* 25, 1863.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and JOHN COOK.

Trial begun.

Now at this day come said parties, by their respective attorneys, and thereupon this cause coming on for trial, and said parties waiving
367 a jury, the cause is tried by the court upon the evidence herein and the proofs adduced; and the evidence on the part of the plaintiff being closed, the court thereupon, on motion of defendant Charles P. Chouteau, by his attorney, doth find a verdict herein for said defendant Charles P. Chouteau; and it is thereupon ordered and adjudged by the court that said defendant go hence without day and recover of said plaintiff his costs and charges herein expended; and thereupon the trial progressed, and not being fully terminated, it is continued until to-morrow morning for argument of counsel.

And the further progress of the trial of this cause continued on the following day, to wit, Thursday, November 26th, 1863, and not being fully terminated, is continued until to-morrow morning.

And afterwards, to wit, at the same term, the following further proceedings were had in this cause, to wit:

Trial progressed and cause sub.

FRIDAY, *November 27th*, 1863.

368 CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and JOHN COOK.

Trial progressed.

And now again, at this day, comes said plaintiff and the defendant Pierre Chouteau, jr., and John Cook, by their respective atorneys, and thereupon the trial progressed; and the evidence being concluded the cause is submitted to the court, and the court not being fully advised of and concerning the premises, takes time to consider thereon.

And afterwards the following further proceedings were had in this cause, to wit:

Judgment.

SATURDAY, *January 28th*, 1865.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., AND JOHN COOK. } October term, 1864.

Trial ended. Judgment.

And now again, at this day, comes said parties, by their respective attorneys, and the court being now fully advised of and concerning
369 the premises, finds the issues herein for the plaintiff, and doth assess his damages at the sum of six hundred dollars, and the monthly value of the rents and profits of the premises sued for at fifty dollars. It is therefore ordered and adjudged by the court that the plaintiff recover of said defendants the possession of the following-described real estate, in the county of St. Louis, to wit, all that portion of United States private survey number twenty-four hundred and ninety-eight, in the name of James Y. O'Carroll, or his representatives, which is bounded west and north by the out boundary lines of said survey, and east by other portions of said survey now and then in possession of Mrs. Mary McRee and her tenants, and south by United States survey, 1286 and 1289, in favor of Jeannette, and which portion contains sixty-four acres, more or less; and also the damages and monthly value aforesaid, in form aforesaid, as assessed, together with his costs and charges herein expended; and that he have execution therefor.

And afterwards, to wit, on the same day, the following further proceedings were had in this cause, to wit:

370 *Motion for a new trial filed and overruled.*

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL.

Now at this day there is filed in this cause a motion for a new trial, and the same is submitted to the court; and the court being fully advised of and concerning the premises, doth order and adjudge that said motion be overruled.

Stipulation for filing a bill of exceptions.

And afterwards, to wit, on the same day, the following further proceedings were had in this cause, to wit:

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL.

Now at this day there is filed in this cause a stipulation in words and figures following:

CHARLES GIBSON
vs.
PIERRE CHOUTEAU ET AL.

To St. Louis Land Court:

It is agreed that the defendant may present any instructions to the court additional to the fifteen already presented to the court, and that they may be passed upon by the court in the same manner and with a like
371 effect, as if presented and passed upon at the time of the trial of this cause, and that the bill of exceptions in this case may be presented to the judge of this court and allowed in vacation with the same effect as if the said bill of exceptions had been presented to the court and allowed during the present session of said court, and relase all errors on account thereof.

C. GIBSON,
HILL, GLOVER & SHEPLEY,
Attorneys for Defendants.

And afterwards the following further proceedings were had in this cause, to wit:

Bill of exceptions filed.

MONDAY, *February 27th*, 1865.

Bill of exceptions.

In the St. Louis land court.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL.

In vacation. Bill of exceptions filed in this cause, which bill of exceptions is in the words and figures following, to wit:

CHARLES GIBSON, PLAINTIFF,
vs.
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and JOHN COOK, defendants.

372 Be it remembered that on trial of the above cause the plaintiff gave in evidence the following deed and documents, to wit:

1. Patent of the United States to Mary MacRee, assignee of James Y. O'Carroll, dated the 10th day of June, 1862, as follows:

Patent of U. S. to Mary MacRee, assignee of James Y. O'Carroll.

The United States of America to all to whom these presents shall come, greeting:

Whereas there has been deposited in the General Land Office a certificate, numbered four hundred and ninety-four, of the recorder of land titles at St. Louis, Missouri, whereby it appears that in pursuance of the act of Congress approved on the seventeenth day of February, one thousand eight hundred and fifteen, entitled "An act for the relief of the late inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," and the several acts of Congress amendatory and explanatory of the same, there has been located for James Y. O'Carroll, or his legal representatives, the following tract of land, to wit:

373 SURVEY No. 2498.

Plat and description of survey of a tract of land of six hundred and forty acres, situated in township forty-five north of the base line, range seven east of the principal meridian, in the State of Missouri, executed in April, eighteen hundred and eighteen, by Joseph C. Brown, deputy surveyor, under contract with and instructions from William Rector, surveyor of the lands of the United States in the Territories of Illinois and Missouri, dated the thirty-first of March, eighteen hundred and seventeen, this being the tract located on the sixteenth of June, eighteen hundred and eighteen, by Joseph C. Brown for Christian Wilt, the legal representative of James Y. O'Carroll, in virtue of a certificate numbered one hundred and fifty, issued on the 30th of November, 1815, by Frederick Bates, United States recorder of land titles in the Territory of Missouri, in conformity with the provisions of the act of Congress of the seventeenth of February, eighteen hundred and fifteen, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquake."

374 The location above mentioned calls for, including fractional sections twenty, in township forty-five north and range seven east, the same in which St. Louis is situated, that part of fractional section seventeen, in the same township, which lies south of the cul-de-sac fields, the western half of fractional section twenty-one, in the same township, and so much off from the north side of the western half of fractional section twenty-eight in the same township as will make the quantity. Such lines of this survey as have subsequently been remeasured in whole or in part, as the

lines of other surveys adjoining or interfering, are herein described conformably to the remeasurement. (See plat.)

(Here follows map marked 123 of this transcript.)

DESCRIPTION.

Beginning at a post in the east boundary of Charles Gratiot's survey, numbered two thousand and thirty-seven, the northeast corner of the Prairie des Noyes common fields and the most western corner of this survey from which a, pin oak, three inches in diameter, bears south twenty-seven degrees east, sixty-three links distant, and a hickory, three
375 inches in diameter, bears north sixty-four degrees west, forty-nine and a half links distant; thence north eight degrees and forty minutes east, with the east boundary of the Charles Gratiot survey; at thirty-three chains and thirty-four links a limestone, twenty inches long, ten inches wide, four and a half inches thick, set ten inches deep, with the edge southeastward, marked with a cross on the top, the southwest corner of survey numbered three thousand three hundred and nine, in the name of Calve, from which a cottonwood, six inches in diameter, bears south eighty-three degrees and thirty-nine minutes west eighty-nine links distant; at thirty-nine chains and seventeen and one-third links a limestone, fourteen inches long, fourteen inches wide, three and a half inches thick, set eleven inches deep, with the edge southeastward, marked with a cross on the top, the northwest corner of the Calve survey, and the southwest corner of survey numbered three thousand three hundred and eight, in the name of Hubert, dit Berry, Tabaies' legal representatives, from
376 which a cottonwood, twelve inches in diameter, bears north fifty-three degrees west, two hundred and seventy-two links distant; at forty-two chains and nine links a post, the southwest corner of survey numbered three thousand three hundred and seven, in the name of Joachine Roy's legal representatives, and the northwest corner of the Hubert representatives' survey, and from which a pin oak, ten inches in diameter, bears thirty-six degrees and forty-five minutes east, one hundred and sixty-two links distant, and a persimmon tree, four and a half inches in diameter, bears south fifty-seven degrees and thirty minutes east, fifty-nine *leagues* distant; at forty-six chains and forty-seven and a half links a post, the northwest corner of the Joachine Roy survey, and the southwest corner of survey numbered two thousand nine hundred and seventy-three, in the name of Amable Guion, or Vieve Lecompter' legal representatives, from which a pin oak, six inches in diameter, bears south twenty-seven degrees and forty-five minutes west, fifty-six links distant; and at fifty-two chains and
377 thirty-seven and a half links a stone, the northwest corner of Amable Guion, survey, and the southwest corner of Susanah Dabreuil's survey, numbered eight hundred and thirty-three, and the most northern corner of this survey; thence south seventy-five degrees east with the south boundary of the Susannah Dubruil survey and the north boundary of the Amable Guion survey; at eighty chains and fifty-one links a road leading southwestward; and at eighty-six chains and fifty-one links a stone in the west boundary of survey numbered three hundred and sixty-three, in the name of Augusta Chouteau under Laclede Legost, the southeast corner of the Susannah Dubreuil survey, the northeast corner of the Ama-

ble Guion survey and a corner to this survey; thence south fifteen degrees west with the west boundary of the Augusta Chouteau survey and a line of the Cul-de-Sac Prairie common field, at five chains and eighty-four links a stone, the south east corner of the Amable Guion survey and a corner to the Joachine Roy survey, and at seven chains and nineteen links a
378 limestone, marked with letter "M" on the top, to the southwest corner of the Augusta Chouteau survey, and a corner to this and to the Joachine Roy surveys; thence south seventy-five degrees east with the south boundary of the Augusta Chouteau survey and the north boundary of Francis Cottard's survey, numbered three thousand one hundred and eighty-three; at two chains and thirty-four links a post, the northwest corner of survey numbered three thousand one hundred and eighty-two, in the name of Joseph Mottard, or his legal representatives, and a corner to Joachine Roy survey; at five chains and ninety links a post, the most northern corner of survey, numbered three thousand one hundred and twenty-five, the St. Louis Common, from which a cherry tree four inches in diameter bears north seventy-six degrees west, three hundred and fifty links distant, and a pin oak, four inches in diameter, bears north sixty-six degrees and thirty minutes west, three hundred and twenty-four links distant; and at
379 forty-four chains and sixty-one links, a post in mound, corner to this survey; thence south ninety-seven chains to a post, corner to this survey, from which a white oak, two inches in diameter, bears south nineteen degrees west, eighteen links distant, and a white oak, two inches in diameter, bears south forty degrees west, thirty links distant; thence west twenty-seven chains to a post in mound, the eastern boundary of the Prairie des Noyes common fields, corner to this survey, from which a sassafras, two inches in diameter, bears south forty-nine degrees east, six links distant, and a sassafras, three inches diameter, bears north forty-two degrees and thirty minutes west, fourteen links distant; thence north nine degrees and thirty minutes east, with the eastern boundary of Prairie des Noyes common fields, seventy-eight chains and thirty-five links to a limestone fourteen inches long, thirteen inches wide, three and a half inches thick, set eleven inches deep, with edge westward, marked with a cross on the top, the northeast corner of the Prairie des Noyes' common field, and a corner to this survey; thence north eighty-three degrees west, with the north boundary of the Prairie des Noyes common field; at four
380 chains and twenty-one links an old set stone; at thirty-eight chains and twenty-seven links a branch, ten links wide, runs northward; at sixty-five chains and seventeen links cross a shallow pond three chains wide; at seventy-one chains and eighty-seven links a road bears northeastward; at one hundred and sixteen chains and eighty-seven links the beginning corner.

Statement of interferences of survey No. 2498 with other surveys.

1st. Survey No. 3125, Saint Louis common, confined to the inhabitants of Saint Louis by the act of Congress of the 13th June, 1812, entitled "An act making further provisions for settling the claims to land in the Territory of Missouri." Area of interferences 251.50 acres.

2d. Survey No. 2973, Amable Guion or Vieve Lecompt's legal repre-

sentatives, a lot of 2 by about 30 arpens in the Cul-de-Sac Prairie common field, confirmed by the act of Congress of the 13th June, 1812, and the extent and boundaries thereof proven before Recorder Hunt on the 30th July, 1825, in conformity with the provisions of the act of
381 Congress of the 26th May, 1824, entitled "An act supplementary to an act passed on the thirteenth day of June, one thousand eight hundred and twelve, entitled 'An act making further provision for settling the claims to land in the Territory of Missouri." Area of this survey 50.37 acres.

3d. Survey No. 3307, Joachine Roy's legal representatives, a lot of 1½ by about 30 arpens, in the Cul de Sac Prairie common field, confirmed by the act of Congress of the 13th June, 1812, and the extent and boundaries thereof proven before Recorder Hunt on the 7th and 30th July, 1825, in conformity with the provisions of the act of the 26th May, 1824. Area of this survey, including its interference with survey No. 3183, 38.26 acres.

4th. Survey No. 3308, Hubert, dit Berry, Tabeau's legal representatives, a lot of 1 by 40 arpens, in the Cul de Sac Prairie common field, confirmed by the act of Congress of the 15th June, 1812, and the extent and boundaries thereof proven before Recorder Hunt on the 10th August, 1825, in conformity with the provisions of the act of the 26th May, 1824. Area of the interference west of the Saint Louis common, 26.85 acres.

5th. Survey No. 3183, Francis Cottard, one by forty arpens,
382 confirmed by the act of Congress of the 29th of April, 1816, entitled "An act for the confirmation of certain claims to land in the western district of the State of Louisiana and in the Territory of Missouri." Area of the interfering part that lies west of the Saint Louis common and east of the survey No. 3307, 1.18 acres.

6th. Survey No. 3181, Joseph Mottard or his legal representatives, seven by forty arpens, confirmed by the act of Congress of the 4th July, 1836, entitled "An act confirming claims to land in the State of Missouri, and for other purposes." See decision No. 328 of the board of commissioners, under the acts of Congress of the 9th July, 1832, and 2nd March, 1833. Area of the part that lies south of survey No. 3308 and west of St. Louis common, 1.156 acres. This survey covers land reserved at the time of the location of the James Y. O'Carroll claim.

7th. Survey No. 3309, Cahee, a lot of two or arpens, in the Cul de Sac Prairie common field.

There is no evidence of this claim being confirmed.

The following interference, excluding that with survey No. 3309, containing 379.72 acres.

383 To the residue of survey No. 2498, containing actually 291.45 acres, so far as the records of this show, there is no valid claim.

OFFICE OF THE SURVEYOR-GENERAL
FOR ILLINOIS AND MISSOURI,
St. Louis, March 26th, 1862.

The foregoing plat and description of survey No. 2498 are correctly

copied from the approved plat and description of said survey recorded on page' 268, 269, 270, and 271 of record book A, on file in this office.

WM. CUDDY,
Surveyor-General.

Letters patent to Mrs. MacRee.

384 See diagram. And whereas the right of the said James Y. O'Carroll,
385 th'ough sundry intermediate assignments, has been transferred to Mary MacRee, there is, therefore, granted by the United States unto the said Mary MacRee, as assignee in right of the said James Y. O'Carroll, in virtue of deraignment of title, and to her heirs, the tract of land described in the aforesaid survey, number two thousand four hundred and ninety-eight, hereby expressly *expressly* excepting and excluding from the transfer by these presents such valid rights as may exist in virtue of the claims particularly designated under the 1st, 2d, 3d, 4th, 5th, and 6th heads in the foregoing, and further saving and excepting from the transfer by these presents of any other valid adverse claims, should such exist, to any part of the land embraced in the aforesaid survey, number two thousand four hundred and ninety-eight.

To have and to hold the said tract of land, according to said survey two thousand four hundred and ninety-eight, unto the said Mary MacRee as assignee as aforesaid, and to her heirs and assigns, forever, with the exceptions, reservations, and exclusions as aforesaid.

In testimony whereof I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of
386 the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the tenth day of June, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-sixth.

By the President:

ABRAHAM LINCOLN,
By U. V. STODDARD, *Sec'y.*
J. N. GRANGER,
Recorder of the General Land Office.

Recorded vol. 11, pages 535 to 542 inclusive.

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder in and for said county, do hereby certify that the foregoing instrument of writing was filed for record in my office August 8th, 1862, and is truly recorded in book 265, p. 469.

[L. S.] A. C. BERNOUDY, *Recorder.*

2. A deed of Mary MacRee to Charles Gibson, dated 8th day of August, 1862, as follows:

Deed of Mary MacRee to Charles Gibson.

This deed made this 8th day of August, A. D. eighteen hundred and sixty-two, between Mary MacRee, grantor, and Charles Gibson, grantee, witnesseth:

387 That said grantor, in consideration of three thousand dollars to her paid by said grantee, the receipt whereof is hereby acknowledged, doth here' grant, sell, and convey unto said Gibson a parcel of ground, in the United States survey number twenty-four hundred and ninety-eight (No. 2498), in the name of James Y. O'Carroll or his representatives, situated in Saint Louis County, which parcel is bounded thus: northwardly by the southern line of United States survey number three thousand and three hundred and seven (No. 3307) in the name of J. Roy, or his representatives, as said line is now established, the same being the southern boundary of Sommer's land as now in their possession; westwardly by the old Manchester road; estwardly by the Pacific Railroad; and southwardly by a line parallel with and a sufficient distance south of said fourth line of said survey three thousand three hundred and seven to make the quantity of five acres—the quantity of said parcel of land intended to be conveyed hereby, being five acres precisely. And whereas the said Gibson was the selected counsellor at law of said Mrs. Mary
388 MacRee as to certain litigation concerning her lands, and was also the agent and attorney in fact for the management of her estate in and about Saint Louis, now, in consideration of these premises, and as an evidence of her appreciation of the zeal and fidelity he has manifested in her cause, the said MacRee doth hereby give, grant, and convey unto the said Gibson all of her right, title, and interest (and only her right, title, and interest) in and to the following-described two parcels of land in said survey number two thousand four hundred and ninety-eight (No. 2498), and for which a patent has been issued to said MacRee, and which parcels are bounded and described as follows:

First. A parcel containing eleven acres and one-half of an acre, bounded northwardly by the land herein-above conveyed to said Gibson; westwardly by the old Manchester road; eastwardly by the Pacific Railroad; south by a line parallel with said Gibson's southern line, and a sufficient distance therefrom to make the quantity of eleven and one-half acres.

389 Secondly. All that portion of said United States survey two thousand four hundred and ninety-eight (No. 2498) bounded west by the western out-boundary line of said survey twenty-four hundred and ninety-eight (2498), north by the northern out-boundary line of the same, east by the new king's highway, as heretofore opened, and a line coincident with the same projected south to United States survey' twelve hundred and eighty-six and twelve hundred and eighty-nine (1286 and 1289) in favor of Susan Jeannette, south by said survey in favor of Susan Jeannette, and containing sixty-four acres.

The land intended to be conveyed in this parcel is all that portion of said survey twenty-four hundred and ninety-eight (2498) now or heretofore in possession or claimed by Pierre Chouteau, jr., or Charles P. Chouteau, or the representatives of them or either of them. To have and to hold the said parcels of land and appurtenances to him, said Gibson, and his heirs and assignes, forever.

390 In testimony whereof the said Mary MacRee has hereunto set her hand and seal the date aforesaid.

MARY MACREE. [L. S.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this second day of November, 1862, came before me, the undersigned, recorder of deeds in and for said county of St. Louis, Mary MacRee, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and she acknowledged the same to be her act and deed for the use and purposes therein mentioned.

Witness my hand and official seal, at office, the date aforesaid.

[L. S.] A. C. BERNOUDY, *Recorder*,
Per J. CONRAD, *Deputy*.

STATE OF MISSOURI,
County of St Louis, ss:

I, the undersigned, recorder for said county, certify that the foregoing instrument of writing was filed for record in my office September 15th, 1862, and is truly recorded in book 269, p. 550.

Witness my hand and official seal the date aforesaid.

A. C. BERNOUDY, *Recorder*.

391 *John Flournay's testimony.*

The plaintiff then examined as a witness John Flournay, who testified that he knew the land in controversy, and that the annual value of the land was about eleven dollars per acre.

On cross-examination he stated that the deed of Samuel MacRee and wife to Pierre Chouteau described premises in dispute.

Defendants admitted that Pierre Chouteau was in possession of the premises in dispute at the time mentioned in the petition, and that Cook was there, but only as a servant.

The plaintiff here rested, and on motion of defendant the court found the defendant, Charles P. Chouteau, not guilty.

The defendant then gave in evidence the following documents and deeds, to wit:

1. New Madrid certificate No. 150, dated the 30th November, 1815, issued by Fred. Bates, recorder, as follows:

(See page 122 of this transcript.)

2. Location of said certificate made by Christian Wilt, dated November 8th, 1816, as follows:

(See page 153 of this transcript.)

392 3. Certificate of Joseph C. Brown, agent of C. Wilt, dated 16 June, 1818:

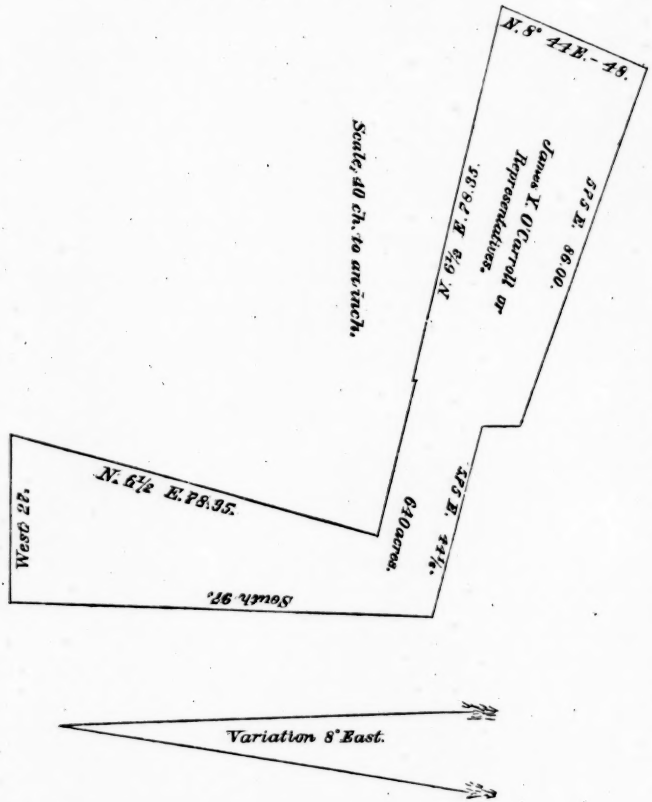
(See page 155 of this transcript.)

(After certif' of surveyor-gen'l to the correctness of J. C. Brown's certif", as above, the printed copy from which this transcript is taken has these words in brackets: [See plat. Here follows map marked "Page 204*a*" of this transcript.]

(For said plat, map, description, &c., see p. 156 of this transcript.)

Survey No. 2498.—*Certificate No.* 150.

Township No. 45, range north No. 7 east.



Survey for James Y. O'Carroll or his legal representatives, 640 acres, located by virtue of a New Madrid certificate.

5. Deed of George Ruddell to James Tanner and Andrew P. 393 Gillespie, dated 7th March, 1816, as follows:

(See page 133 of this transcript.)

(To the givn' of which in evidence plaintiff objected, but the court admitted it, and plaintiff excepted.)

6. Deed of George Ruddell to George Dameron, dated November 1st, 1815, as follows:

(See page 157 of this transcript.)

(To the giving of which in evidence plaintiff objected, but the court admitted it, and plaintiff excepted at the time.)

7. Deed of George Ruddell and wife Andrew P. Gillaspie, dated the 16th day of May, 1818, as follows:

(See page 138 of this transcript.)

(To the reading of which in evidence the plaintiff objected, but the court overruled his objection, to which plaintiff at the time excepted.)

8. Deed of Andrew P. Gillaspie to James Tanner, dated the 17th October, 1816, as follows:

(See page 142 of this transcript.)

(To the giving of which plaintiff objected, but the court admitted the same, to which the plaintiff excepted.)

9. Deed of Andrew P. Gillaspie to James Tanner, dated 1st June, 1818, as follows:

(See page 145 of this transcript.)

10. Deed of James Y. O'Carroll to George Ruddell, dated 29
394 November, 1815, as follows:

(See page 12? of this transcript.)

(To the reading of which in evidence plaintiff objected, because it had not been filed for record within a year from its date.)

And thereupon defendant read the deposition of Michael Branham, as follows:

(See page 127 of this transcript.)

And the court admitted said deed to be read.

11. Deed of Rachel Dameron and als. to James Tanner, dated October 2nd, 1818, as follows:

(See page 161 of this transcript.)

12. Deed of James Tanner to Christian Wilt, dated 31 ( ), 1818, as follows:

(See page 147 of this transcript.)

13. Deed of Hempstead as *gaurdian* of George W. Wilt, only son and heir of Christian Wilt, to Joseph Hertzog, surviving partner, dated September 10th, 1821, as follows:

(See page 223 of this transcript.)

14. Transcript of record, proceedings, and decree of August, 1821, of the St. Louis circuit court, in the case of Hertzog vs. Wilt, as follows:

(See page 201 et seq. of this transcript.)

15. Deed of Joseph Hertzog to Louis Devotion's trustee, dated 26th October, 18?2, as follows:

(See page 165 of this transcript.)

395 16. Deed of Louis Devotion and Joseph Hertzog, by trustee, to Pierre Chouteau, jr., dated 27' November, 1874, as follows:

(See page 174 of this transcript.)

17. Deed of Joseph Hertzog, by sheriff, to Henry Clay, executor of James Morrison, dated the 17th May, 1825, as follows:

(See page 178 et seq. of this transcript.)

18. Judgment of St. Louis circuit court in case of Henry Clay, executor of Morrison, vs. Joseph Hertzog, as follows:

Judgment of circuit court in case of Clay vs. Jos. Hertzog, in the Saint Louis circuit court, in chancery, November term, 1831, May 10th, 1833.

(For copy of judgment, see page 232 of this transcript.)

STATE OF MISSOURI,
County of St. Louis, ss:

I, Stephen Rice, clerk of the circuit court, certify the foregoing to be a

true copy of a decree in chancery in the above-entitled cause as fully as the same remains of record in my office.

In testimony whereof I hereunto set my hand and affix seal of said office, in the city of St. Louis, this 24th day of Nov., A. D. 1863.

[L. S.] STEPHEN RICE, *Clerk.*

396 [U. S. stamp.]

19. Deed of Henry Clay, executor of Morrison, to Ann F. MacRee, dated Oct. 11th, 1839, as follows:

(See pages 189 et seq. of this transcript.)

20. Deed Ann F. MacRee and others to Samuel MacRee, dated July 4th, 1836, as follows:

(See pages 193 et seq. of this transcript.)

21. Transcript of record in the St. Louis circuit court in the suit of Samuel MacRee against Edward Hempstead and als., and heirs of Hertzog and heirs of Wilt, as follows:

(See pages 249 et seq. of this transcript.)

22. Deed of Samuel McRee and wife to Pierre Chouteau, dated 30th August, 1838, as follows:

(See pp. 198 et seq. of this transcript.)

23. Confirmation to Joseph Calves' legal representatives for 2 by 40 arpens in cul-de-sac, as follows:

Confirmation to J. Calves' representatives.

A.

Opinions of the recorder of la . titles for Missouri Territory as to claims entered under act of June 13th, 1812, and proven before 1st January, 1814, as provided by the act of the 3rd of March, 1813, com-
397 prehending also the claims in the late district of Arkansas, which, by act of 2d August, 1813, were permitted to be entered until 1st January, 1814, and proven until 1st of July, 1814, together with the extensions of quantity provided by 4th section of the act of 3rd March, 1813, and confirmations under the act of 12' April, 1814.

Warrant of order of survey. Priv. land book 1, p. 17.

Quantity claimed: 2 by 40 arpens.

Poss'n, inhab'n, and culti'. Poss'n and inhab'n prior to 1803.

Survey; not platted.

Notice to the recorder, by whom: Joseph Calve's representatives.

Where situated: F. 153. Field of St. Louis B. Prairie.

Opinions of recorder: Confirmed, 80 arpents to be surveyed.

RECORDER'S OFFICE,
St. Louis, 24th April, 1851.

I certify that the above is correctly transcribed from pages 1 and 7, in book No. 1, being one of the five small books in this office, with the following endorsement on the first and also on the fifth book, believed to be in the handwriting of Frederick Bates, to wit:

"These five small books are origina', in the proper handwriting of the

undersigned, being his decision on land claims since the adjournment of the late board.

"They were arranged and fairly transcribed for report to the Com-
398 missioners of the General Land Office, but not yet recorded in the books, because they have no authority till sanctioned by Government.

"FREDERICK BATES,
"*Recorder of Land Titles.*

"St. Louis, November 1st, 1815."

ADOLPH RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

CALVE.—Du trente Avril, mil sept soixante-huite, sur la demande de Joseph Calve, "habitante à St. Louis," nous luy avons concèdé et conceddons à titre de propriété une terre de deux arpents de face sur quarante arpents de profoundeux, située à la Grand Prairie, tenanté d'un côté à la Veuve Maréshal et de l'autre côsté à la Petite Rivieur, aux conditions d'établir la dite terre sous l'an et jour. Donné à St. Louis, la trente Avril, mil sept cent soixante-huit.

(See levre terrien No. 1, folio 17.)

ST. ANGE LABUXIÈRE.

Minutes of the recorder of land titles acting as commissioner under the act of Congress entitled "An act making further provisions for settling the claims to land in the Territory of Missouri," passed the 13th
399 day of June, 1812, and other acts subsequently passed.

FREDERICK BATES,
Commissioner.

ST. LOUIS, *December 31st*, 1813.

Joseph Calve, claiming 2 by 40, Big Prairie fields, St. Louis, Con., No. 1, folio 17. Auguste Chouteau, sworn, says this lot was cultivated 40 years ago, and till fence was taken down. Conf'd O. S. See Bates' minutes, pages 133, 141, and 141.

OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, 24' *September*, 1856.

I certify that the above is, with the attached paper marked "A," a full and correct transcript, from the books, files, and documents in this office of the claim of Joseph Calve's representatives to 2 by 4 arpents of land in the fields of St. Louis, Big Prairie.

ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

Translation of the concession to Joseph Calve, as given in French at the beginning of the foregoing page, copied from liure terrien No. 1, fol. 17:

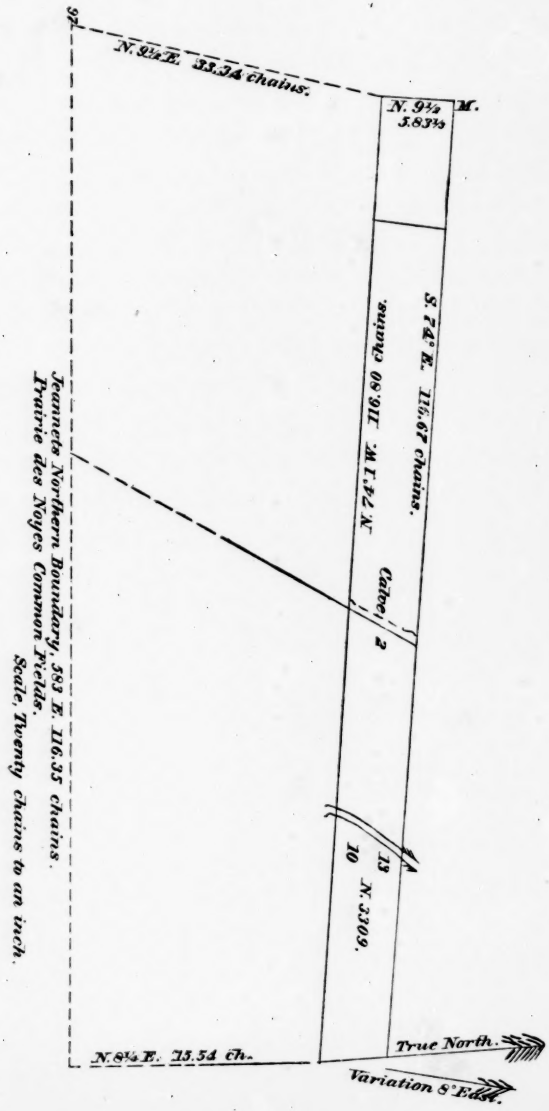
"On the demand of Joseph Calve, inhabitant of St. Louis, made on the thirtieth day of April, one thousand seven hundred and sixty-
400 eight, we have conceded and concede to him in fee-simple a piece of land of two arpens in front by forty arpens in depth, situate in the Grand Prairie, bounded on one side by Widow Marechal and on the other side by the Little River, under the conditions to settle upon said land within a year and a day.

"Given in St. Louis on the thirtieth of April, one thousand seven hundred and sixty-eight.

"ST. ANGE LABUXIÉRE."

Translated Sept. 28, 1865, by Fred'k Mosberger.

(See plat. Here follows map marked page of this transcript:)



401 DESCRIPTON.—Commence at the northwest corner of the lot the southwest corner of Herbert dit Berry Tabenies' legal representatives' lot, a limestone three and a half inches thick, 14 wide, and 14 inches long, set 11 inches deep, the edge southeastward, and make a cross on the top; thence south 74 east along the southern boundary of the lot of said Tabeau's representatives, which is the northern boundary of this lot; 13.93 chains a fence bears north 8½ east; 67.53 chains the road leading from Manchester northward to St. Louis; 84.13 chains a branch, 8 links wide. runs northward; 85.03 chains a point from which the southeast corner of Joachine Roy's legal representative's lot bears north 15¼ east 29⅜ chains distant; 116.67 chains, the northeast corner of this lot, and southeast corner of the lot of said Tabeau's legal representatives, from which I set a limestone 3 inches thick, 12 inches wide, and 16 inches long, set 12 inches deep, with the edge northwestward; thence south 9½ west along the eastern boundary of the lot; 5.87½ chains set a limestone 2¾ inches thick, 14 inches wide, and 14 inches long, set 11 inches deep, the edge north-
402 westward, the southeast corner of the lot from which the northeast corner of Floses, being the northeast corner of common fields of Prairie des Moyers, bears south 3¼ west 155.4 chains distant; thence north 74 west along the southern boundary of this lot; 33.70 chains a branch, 10 links wide, bears northward; 53.30 chains the said road bearing northwestward to St. Louis; 102.65 ch's a fence bearing north 8 east; 111.83 chains a point from which the northeast corner of a brick chimney of a dwelling-house bears south 63½ west, 53½ links distant; 116.80 chains the southwest corner of the lot on the eastern boundary of Gratoit's survey No. , for which I set a limestone 4½ inches thick, 10 inches wide, and 20 inches long, set 10 inches deep, the edge southeastward, and make a cross on the top; from which a cotton-wood, 6 inches diameter, bears south 83½ west 89 links; thence north 9½ east along the eastern boundary of Gratoit's said survey 5.83¼ chains to the beginning northwest corner, from which a cotton-wood, 12 inches diameter, bears north 53 west 272 links distant.

403 OFFICE OF THE SURVEYOR-GENERAL,
FOR ILLINOIS AND MISSOURI,
St. Louis, October 8th, 1856.

The foregoing is correctly copied from the original field-notes returned by Joseph C. Brown, on file in this office.

JOHN LOUGHBOROUGH,
Surveyor-General.

(See plat. Here follows map marked page of this transcript.)

404 SURVEYOR'S OFFICE,
St. Louis, 31st of January, 1845.

The accompanying plat of township 45 north of the base line, range 7 east of 5th the principal meridian, is strictly conformable to the field-notes of the surveys thereof on file in this office, which have been examined and approved.

(Signed:) SILAS REED,
Surveyor of the Public Land in the State of Illinois and Missouri.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, Sept. 28th, 1865.

The above plat of survey No. 2498, of a location under New Madrid certificate, No. 150, in the name of James Y. O'Carroll, or his legal representatives, and of the interferences therewith, namely, survey No. 3309, in the name of Calve; of survey No. 3308, in the name of Hubert dit Tabeau; of survey No. 3307, in the name of Joachine Roy; of survey No. 2973, in the name of Amable Guyon, or Ve've Lecompte's legal representatives; of survey No. 3125, of the St. Louis Common; and of survey No. 3182, in the name of Joseph Mottard, or his legal representatives, together
405 with the connection of the adjoining and surrounding surveys, as also the above certificate by Silas Reed, dated the 31st of January, 1845, are all correctly copied from the plat of township 45 north, range 7 east, of the 5th principal merid'an, as the same appears to be approved by the certificate above copied, which plat remains on file in this office.

FRED'K MOSBERGER,
Recorder.

[U. S. stamp.]

(The plaintiff objected to the admission in evidence of each and all of the documents, deed, decrees, and surveys offered by defendants at the time when the same were offered, respectively, on the ground that the same were void, incompetent, and irrelevant, but the same were admitted, to which the plaintiff excepted.)

Charles P. Chouteau's testimony.

CHARLES P. CHOUTEAU, a witness for defendants, testified as follows:

I have examined the deed of the 30th August, 1838, from Samuel McRee and wife to Pierre Chouteau, jr. The land therein described is on the west end of the O'Carroll tract, and embraces about fifty-four acres. I was present at the survey, by Cozzens, a good many years ago.
406 My father, Pierre Chouteau, jr., has been in possession of this land ever since I can recollect. I recollect his being in possession as far back as 1826. He has always been in the sole possession of it. He has had servants; John Cook has been a servant of his since 1 January, 1851. There *was* no other servants there before Cook came who are there now. Mr. Chouteau directs the management and carrying on of that farm. He has a house on it. Mr. Cook resides on the other side of the river Des Peres, outside of the tract of land in controversy. Mr. Chouteau has used this as a place of summer resort; he has house servants that remains there as his servants. The sixty-four acres have been inclosed with a worm-fence and board-fence. I have resided on the place two or three summers by Mr. Chouteau's invitation. Mr. Chouteau's servants and hired men were then on the place. The house of Mr. Chouteau is on this place, built before I can remember.

On cross-examination witness said:

407 Mr. Cook is paid by defendant in money; he has no interest in the produce of the farm, nor in the stock of farming utensils. He has no other interest. Some ten years ago Cook lived in house on the place for a short time; it was a servants' house that Cook lived in.

P. A. Berthold's testimony.

PIERRE A. BERTHOLD, a witness on the part of the defendants, testified as follows:

I have known Mr. Chouteau, the defendant, since 1830. Pierre Chouteau, jr., has been in possession of the land in controversy since 1830. He had it fenced, had house on it, and servants in it.

John R. Shepley's testimony.

JOHN R. SHEPLEY, a witness for the defendants, testified as follows:

I was counsel for Pierre Chouteau, jr., in suit in the United States circuit court, brought by Holmes against Chouteau and against others, to recover portions of the James Y. O'Carroll tract. There was other suits of the same plaintiff against Mrs. McRee and her tenants. Mrs. McRee had Mr. Gibson and Mr. Geyer for her counsel. The cases against
408 Mrs. McRee's tenants stood earlier on the docket. Mr. Gibson and myself consulted together before the trial came on, and we also consulted with Mr. Dayton, who was counsel for Mrs. McRee, I think. When the trial came on we consulted together, and during its progress. The deed of Ruddel to Tanner and Gillaspie for 550 arpents, made in 1816, was objected to and ruled out, as I afterwards discovered, on account of a parcel of the description being omitted in the copy we had. Mr. Gibson and myself had a consultation in the court-room after the deed was rejected. At my suggestion, I think, it was agreed that Mr. Gibson, acting for Mrs. McRee, and I, acting for Mr. Chouteau, should get conveyance from the heirs of Ruddle and from some of the heirs of Dameron; Mr. Gibson was to get the Ruddle heirs and I the Dameron heirs. It was understood that we were to get these deed(s) for the joint benefit of Mrs. McRee and Mr. Chouteau. I sent down Mr. Sedgwick to Tennes-
409 see and Mississippi, and paid him $150 to try and get the Dameron heirs, which sum Mr. Chouteau afterwards paid to me. My recollection is that the portion of the deed from Ruddle to Tanner and Gillispie left out in our copy was the reference in the description of the land conveyed that it was confirmed to James Y. O'Carroll; thinks that H. R. Gamble was counsel for Mrs. McRee, but not present at that trial. I had no conversation with Mrs. McRee. The conversation with Gibson was in court-room at the counsel-table, before the trial was ended. The evidence was through or nearly through. Gibson was not counsel for Chouteau.

On cross-examination the witness said:

Mr. Gibson and myself made an agreement to attempt to procure both titles for the joint benefit of both parties. I never acted for Mrs. McRee. I was attorney for Mr. Chouteau, and Mr. Gibson was attorney for Mrs. McRee. There were none of Chouteau's cases tried. Mrs. McRee's case was tried, and the case was then taken to the United States Supreme
410 Court at Washington. I understood Mr. Gamble and Mr. Gibson appeared for Mrs. McRee at Washington. Mr. Hill and myself were employed by Mr. Chouteau in the United States circuit court. I don't know how much was paid to the Ruddel heirs for the deeds obtained

from them. I don't think Mr. Chouteau ever had an opportunity to pay any part of the consideration paid for these deeds; don't know that Chouteau and Mrs. McRee quarrelled. We made absolute agreement without consulting with our respective clients; don't know that Gibson ever acted as agent or attorney for Chouteau, further than arose from my agreement with him. I acted as Chouteau's counsel only in the Holmes cases. Gamble and Gibson argued the case at Washington. Chouteau, so far as I know, did not pay Geyer, Gamble, or Gibson.

The defendant here rested.

And, in rebuttal, the plaintiff gave in evidence the following documents:

1. Certificate of annul/ment of survey No. 2498, dated 26' March, 1862, as follows:

Certificate of annullment of sur. No. 2498.

411 "It is hereby ordered that the transcript plat of survey No. 2498, in the name of James Y. O'Carroll, or his legal representatives, under New Madrid certificate No. 150, and transmitted by Silas Reed, surveyor-general of Illinois and Missouri, to the recorder of land titles at St. Louis, on the 10th day of August, 1841, being erroneous in omitting to show the interference of other surveys with the same, being in contravention of the instructions of the Commissioner of the General Land Office, having been superseded by the correct plat of said survey returned to said recorder by the undersigned on the 26th day of March, 1862, on which a new patent certificate and a patent to Mary McRee, assignee of James Y. O'Carroll, has been issued, be, and the same is hereby, set aside, cancelled, and annulled."

OFFICE OF THE SURVEYOR-GENERAL
FOR ILLINOIS AND MISSOURI,
St. Louis, April 29th, 1863.

I hereby certify that the above is correctly copied from the order issued by me April 2nd, 1863.

WM. CUDDY,
Surveyor-General.

(To the giving of which in evidence the defendants objected as
412 irrelevant and incompetent; but court admitted the same, and defendants at the time excepted.)

2. Order of Thomas S. Nelson, recorder of land titles, dated December , 1862, in relation to said survey, as follows:

(See copy on page 298 of this transcript.)

(To the reading of which in evidence defendants objected as being incompetent and irrelevant testimony; but the court admitted the same; to which the defendants at the time excepted.)

3. Decisions of Commissioner of General Land Office, dated January 9th, 1863, as to U. S. survey No. 2498, as follows:

(See page 297 of this transcript.)

4. Decisions of the Secretary of Interior, March, 1863, affirming above decisions, as follows:

(See page 299 of this transcript.)

5. General instructions of Comm'r of General Land Office as to transcript plats of surveys, 19th March, 1847, as follows:

General instructions of Commissioner of General Land Office, &c.

(Copy.)

413 GENERAL LAND OFFICE, *March* 19th, 1847.

SIR: In reference to the claim of Francis Cottard for 40 arpens to an "out lot," (State Papers, D. Green, vol. 3, page 380), I herewith inclose for your information a copy of my letter of this date to the recorder at St. Louis.

Should the party claiming under Cottard propose to renew his application for a patent for survey No. 3183, in township 45 N., R. 7 E., it will be necessary, and you are requested, after full notice and opportunity afforded of being heard to all parties interested, to make a thorough examination into the various conflicts with said survey, and report the result with all the evidence which may be presented, accompanied by your decision as to the validity or invalidity of each intereference.

One of the claims interfering with Cottard is N. M. 150, O'Carroll.

O'Carroll's New Madrid claim, L. C. No. 150, which is referred to in a letter from this office to the S. Gen'l of the 28th August, 1841, and in yours (A) of the 30th July, 1845.

All that portion of O'Carroll's location east of the Saint Louis
414 common line will yield first to the "common" claim.

Besides this interference with O'Carroll, N. M. 150, are the following: (2d) sv. No. 2973, (3d) sv. No. 3307, (4th) sv. No. 3308. According to S. Gen'l's letter (A) of 30th July, 1845, the 2d, 3d, 4th were proved before the recorder in 1825. The 5th sv., No. 3309, not confirmed. O'Carroll is also interfer'ed with by (6th) sv. No. 3182, decision No. 328, of the late board.

If, on examination, it should satisfactorily appear to you that the lands embraced by said surveys were, at the date of O'Carroll's location, lands reserved for said claims, the O'Carroll location must yield to them, because such land is interdicted under the New Madrid act of 17' Feb., 1815; but if, at the time of location, either of the tracts was not reserved but such lands as *was* authorized by the New Madrid act to be located, the New Madrid claim No. 150 will, of course, hold valid against either tract in this category.

The facts on this point can be best determined by the S. General from the records of his office, aided by those of the recorder. If there
415 should be no valid claim to any portion of the residue of the O'Carroll claim, and such residue was such land as was allowed by the New Madrid act of 17' Feb., 1815, to be located on the return here of a proper plat and patent certificate for said residue, a patent will issue. If Mottard's survey, under decision No. 328, late (Mottard No. 328, late board) board be correct, he will be entitled to a certificate on account of the valid interference with him of the St. Louis common claim, and also by the 4th survey above, and by Cottard No. 3183; whether he will be entitled to the area elsewhere, in lieu of the small portion of his claim west

Witness says: I have seen that letter before. I made two copies; one copy was signed by Mr. Gibson, and I carried it in person to Mr. Shepley at or about the day of the date of said letter.

(Letter marked "Exhibit B," from Charles Gibson to P. Chouteau, shown witness. Said letter is hereto attached.)

Witness says: The original letter, of which Exhibit B is a copy, was delivered by me to Mr. Chouteau at or about the day of its date.

(Defendant's counsel, B. A. Hill, objects to said letters and the answers of witness as incompetent, irrelevant, and impertinent.)

Cross-examined by defendant, Pierre Chouteau, jr. Counsel, B. B. HILL, Esq.:

Q. Did you ever see the James Y. O'Carroll tract?

A. No, sir; I never saw the James Y. O'Carroll tract in New Madrid.

Q. Did you ever know George Ruddle?

A. No, sir.

Q. Did you ever know that John Ruddle had any title to the O'Carroll tract in New Madrid of your own personal knowledge?

A. I don't know.

Q. At the time you bought John Ruddel's interest in said tract, did you have any personal knowledge of the interest or claim of John Ruddel to the said tract in New Madrid?

421 A. I knew everything the record shows; I had examined the claim on record; I had no personal knowledge except what the record showed.

Q. Did you know that suits were pending in the name of Peter H. Holmes against Mary McRee and her tenants, and Pierre Chouteau, jr., and his servants, for the recovery of the portion of the New Madrid location, in survey No. 2498, in St. Louis County, at the time you procured the interest or title supposed to be in John Ruddle, to the New Madrid tract and location?

A. I knew certain suits were pending, as stated in the question.

Q. Do you know whether the deed from John Raddel, obtained by you, was obtained for the purpose of aiding in the defence of said suit brought by Peter H. Holmes?

A. I do not know, of my own knowledge, that such was the case; I have an opinion about it, but don't know.

Q. Were you not informed that such was the fact by Charles Gibson or Furgus MacRee?

(Objected to by plaintiff's counsel, as to that portion relating to Furgus MacRee, as hearsay.)

A. As to Mr. Gibson, he never told me anything about it. Furgus McRee may have told me so; I think he did; he gave it as his opinion, when he did say so, that the object was to quiet the title.

Q. Who directed you to take the title from John Ruddle in your own name?

A. I think it was optional with me; my instructions were to
422 get the title as circumstances indicated; if I could have got it in Mrs. McRee's name, I would have done so; but found the man obstinate. I was acting then as agent of Mrs. McRee, entirely.

Re-examined by plaintiff's counsel:

Q. Did Fergus McRee, or anybody else, ever assert or intimate to you

or any one to your knowledge, that the title you bought from John Ruddel was purchased for the purpose of quieting the claims of the defendants in this case, or either of them, in any manner whatever?

(Objected to by defendants' counsel as leading and incompetent.)

A. I cannot say that he ever did.

WM. T. MASON.

Robert V. Corcoran's depositions.

ROBERT V. CORCORAN, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

I studied law in plaintiff's office; am a lawyer; first commenced studying law with the plaintiff in September, 1856, and remained there until Mr. Mason came to the office of plaintiff. I was the agent who purchased the title of certain of the Ruddle heirs to the O'Carroll tract in St. Louis County. I acted as agent and purchased the title of all the Ruddle heirs to the O'Carroll tract, except the title of John Ruddle. The titles were purchased for the benefit of, and with the money
423 of Mrs. McRee. To my knowledge none of the titles were bought for Pierre Chouteau, jr. I understood at the time that the money paid to me for my services and for the titles *were* out of the funds of Mrs. McRee. I mean by those titles mentioned above, the titles in the name of the plaintiff, and for which deeds were made to him.

ROBERT V. CORCORAN.

Deposition of Wm. G. McRee.

WM. G. MCREE, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

I am a student at law. The title of the Ruddle heirs to the O'Car tract were purchased by the plaintiff for the benefit of, and with the money belonging to, my mother, Mrs. Mary McRee.

The plaintiff never claimed any portion of the titles bought of the Ruddle heirs as against my mother.

The plaintiff mentioned at the time that all the titles of said Ruddle heirs held by him, was bought with the money and held for the benefit of my mother, and was ready to dispose of the same in any manner whatever, as she might direct. The title of the Ruddle heirs to that portion of the O'Carroll tract claimed by Pierre Chouteau, jr., was given by mother to the plaintiff on account of the manner in which he defended the
424 case brought against her by Chouteau and other parties; it was a free gift by my mother to the plaintiff, and was not solicited by him from her. After the title was given to plaintiff he offered to Charles P. Chouteau to make his (Chouteau's) title to that portion of the O'Carroll tract claimed by him perfect under Ruddel if he (Chouteau) would cause the title claimed by him, Berthold, and others, against Mrs. McRee's homestead to be vested in her. Plaintiff made various attempts to accomplish that negotiation, but failed in doing so. There was no understanding between my mother and plaintiff, or any of the Chouteaus, that any portion of the titles so purchased by the plaintiffs was purchased for the benefit of P. Chouteau, jr., or any other Chouteau. There was no un-

derstanding or agreement whatever between my mother and Pierre Chouteau or Charles P. Chouteau, or any one acting for them, that any portion of the title so purchased by the plaintiff was to be enjoyed by them or either of them. My mother had no communication with either of the Chouteaus, and would have none; she would *have not* purchased any titles with them, and would have nothing to do with them at all. Neither of the Chouteaus assisted my mother in defending the Holmes case.
425 The Chouteaus did not and would not pay any of the fees of Geyer, Gamble, or Bates in those cases. My mother paid Mr. Geyer $1,000.00, Mr. Bates $500.00 and Mr. Gamble $1,500.00 for his fees at Washington, and do not remember how much Mr. Gamble received for his services in the supreme court of Missouri. My mother would not have permitted the plaintiff, as her agent, to have purchased any of the said titles for her or either of the Chouteaus, jointly or in common. She positively declined to have anything to do with them, or permit her agent to have anything to do with them.

W. G. McREE.

Cross-examination by Peirre Chouteau, jr. Counsel, B. A. HILL, Esq'r.:

(Defendant's counsel at the same time objected to so much of the deposition of this witness as relates to the offer of Charles P. Chouteau to make his title as irrelevant, incompetent, res inter alios acta.)

Q. Before the purchase of any of the pretended Ruddle titles, did your mother have any understanding in regard to how the titles were to be purchased, in whose name, for what object?

A. She was informed by Mr. Gibson that those titles were in existence, and were necessary to protect her title to the lands in controversy,
426 and were bought with her money and for her sole use and benefit. I was present at a number of conversations between my mother and plaintiff, in which this matter was discussed before the purchase.

Q. Do you know whether any of the attorneys of Pierre Chouteau, jr., assisted in the defence of the cases against your mother or her tenants in the Holmes cases?

A. I cannot say positively that I do, of my own knowledge.

W. G. McREE.

Deposition of Mary McRee.

Mrs. MARY MCREE, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

I am the widow of Lieut. Col. Samuel McRee, of the regular Army. My husband and I made a deed to Pierre Chouteau, jr., to that part of the O'Carroll tract claimed by him (Chouteau). The deed was made about Sept. or Oct., 1845. This was the only deed we made to him for the land. Nothing was paid to my husband or myself for that deed. Col. Wm. McRee, brother of my husband, desired Mr. Chouteau and urged him to join in the purchase of the O'Carroll tract, and take the half of it. Chouteau declined, because he thought the title bad. Afterwards Col. Wm. McRee borrowed the money of Chouteau and bought the whole tract.
427 After this Chouteau desired Col. Wm. McRee to convey to him the

64 arpents. Col. Wm. McRee afterwards died without making any conveyance or promise to convey. Five or six weeks after the death of Col. Wm. Ree Mr. Chouteau visited my husband at Prairie du Chien for the purpose of obtaining a deed from him for the 64 arpens. He did not pretend that Col. Wm. McRee had made any pledge to convey the property, but said he was confident he would have conveyed it, and referred to William Carr Lane, Peter Lindell, Major Graham, and Col. Brant to substantiate his statement. Col. McRee replied to him jocularly that he (Chouteau) had said he did not consider the title worth anything. Mr. Chouteau urged Col. McRee very much to make a deed. Col. McRee told Chouteau he would be in St. Louis in two or three months, and he would then ascertain from the gentlemen above named what would be the course pursued by his brother, and that he would carry it out. Mr. Chouteau then asked Col. McRee to use his influence with the other two heirs of Col. Wm. McRee to get a title, which my husband refused to do, saying that they were heirs-at-law, and in no way obligated to carry out his brother's action, but that he intended making a proposition to purchase the heirs' interests, in which case the matter would be entirely in
428 his own hands.

The gentlemen referred to all said that they had no doubt that Col. Wm. McRee would have given Chouteau the title, but they all thought that Col. Samuel McRee was in no way bound to do it; but my husband, nevertheless, concluded and did make a deed. Mr. Chouteau visited my husband at Prairie du Chien in 1833, when the above conversation took place. In 1834 an appointment was made to my husband and Mr. Chouteau to meet at lawyer Gamble's office to make a deed for the 64 arpents, when Mr. Chouteau, to the disgust and amazement of Col. McRee, laid claim to half of the tract instead of the 64 arpents. My husband was so outraged that he would have nothing to do with Mr. Chouteau, and told Chouteau what he thought of him. A deed was finally made in 1845 for the purpose of complying with the intention of *of* Col. Wm. McRee, and for no other consideration. Mr. Chouteau, about two or three years after the meeting at Mr. Gamble's office, demanded his mortgage-money, and it was paid him; Mr. Gamble advising him, that when he demanded his money, he had no legal claim, and he lost the shadow of an honorable claim; none of the heirs of Charles
429 Gratiot set up any claim to the lands of my husband, or pretended to have any during my husband's life. Three or four years after the death of my husband, they set up the claim involved in the case of Chouteau, Berthold, and others against myself and McDonald. That suit cost me about $5,000. I was acquainted at the time with the circumstances under which the plaintiff bought the title of the Ruddle heirs to the O'Carroll tract in St. Louis County. The titles were bought for my benefit, but with the plaintiff's money, he advancing the money and charging it to me. There was no agreement between myself or the plaintiff, as my agent, in the purchase of those titles, whereby Chouteau was to have the titles or derive any benefit from the purchase. On the contrary, I would have nothing to do with them, and forbid Mr. Gibson, as my agent, to have anything to do with them.

The titles were taken in the plaintiff's name, with my entire approbation. The plaintiff often mentioned to me that he was ready to dispose of the titles at any time in any manner that I thought proper.

It was my desire that the plaintiff should hold that portion of the O'Carroll tract claimed by the Chouteaus for the purpose of checkmating them. 'The plaintiff proposed to Mr. Charles P. Chouteau to make his title good to the 64 arpents if he would get a quit-claim from the
430 Gratiot heirs for the Jeannette arpent, being my homestead. This proposition was made repeatedly. It was made repeatedly after I had given plaintiff the title to the 64 arpents. Mr. Charles P. Chouteau offered the title of himself, wife, and Mrs. Mouthalin, but failed to induce the rest of the heirs to do likewise, and the negotiations broke off there, as Mr. Gibson refused to take a portion of the heirs to the title to the Jeannette arpents; he wanted a perfect title. In case Mr. Chouteau complied with the proposition of plaintiff, Mr. Gibson was to have got nothing for his title. I gave plaintiff the title, and he, of his own motion, endeavored to use it with Chouteau, as aforesaid, for the purpose of settling two lawsuits and of relieving me of the burden of law. Gibson insisted on having the whole of the Gratiot title to the homestead in order to settle up the case of Chouteau, Berthold, and others against me. Messrs. Geyer, Gamble, and Bates were employed by me to defend the Holmes case, in addition to plaintiff. I paid Mr. Geyer $500 in land court and $500 in circuit court of the United States. I paid Mr. Gamble $1,500 at Washington, and in the supreme court of this State a large fee; I don't remember how much. I paid Mr. Bates $500. No portion of the
431 amounts paid by me to the above-named gentlemen were paid by Chouteau, and he never intended to pay them. He never paid any cost of the litigation, nor never intended to pay any. Mr. Hill or Shepley, as his counsel, or any one else as his counsel, never rendered any assistance in the defense of the Holmes cases.

MARY McREE.

EXHIBIT A.

Letter of Gibson to Shepley.

ST. LOUIS, *April 2nd*, 1857.

Mr. JOHN R. SHEPLEY:

DEAR SIR: The title I hold to that portion of the O'Carroll tract, for which I have brought suit against Mr. Charles P. Chouteau and al. is derived from the heirs of George Ruddel, who have conveyed to me, and is a title that I know cannot be successfully defended against. I do not, however, covet any of Mr. Chouteau's land, but at the same time I do not intend that he shall have any of Mrs. McRee's land, who is my client. I am willing to have either war or peace. It is for Mr. Chouteau to choose for himself; but if war, the blows will not be all on side. As to who will be most successful, time and the courts will determine. The case of Berthold and al. vs. McDonald and MacRee is, I undertake to say, a bad case in law, and a disgraceful one in fact on the part of the plaintiffs, and particularly on the part of Mr. Pierre Chouteau, whose deed as ad-
432 ministrator of Charles Gratiot, my client holds for the land. I am authorized to speak in these plain terms as to the moral of that case as well from the facts thereof as from the judgment of the supreme court upon the moral propriety of the heirs of Gen'l Gratiot permitting

such a case to be brought. You are aware of the decision. In justice to Mr. Chouteau, who bears the character of a highly honorable man, I will say that I do not believe that he or mony of the Gratiot family ever knew of the kind of a case they were bringing. From all that I know the whole matter is the invention of Mr. Chas. D. Drake, one of their counsel. Still, if they permit the matter to go further, we can look only to them. If Mr. Chouteau will cause the title of Gratiot heirs to be vested in Mrs. McRee, and pay me one thousand dollars, which is about his share of fees and costs of the case of Holmes vs. Fenn, tried in the circuit court of the United States, and of the amount paid by me to the heirs of Ruddle, I will convey to him.

Please answer at your earliest convenience, as I desire to know whether I have try the case or not. If I receive no answer in ten days from this date I will take it for granted that Mr. Chouteau declines to accept this proposition, which is open for that length of time, and no longer.

Yours, sincerely,

C. GIBSON.

433 EXHIBIT B.

Letters from Gibson to C. and P. Chouteau.

ST. LOUIS, *Nov. 30th*, 1858.

CHARLES P. CHOUTEAU, Esq.:

DEAR SIR: A long time has elapsed since negotiations first commenced between us to compromise my title to land in possession of Mr. John Cook, in U. S. survey No. 2498.

It has been deemed advisable for me to notify you that all propositions or attempts to compromise on my part are at end, and which I now do. I will prosecute the case hereafter as promptly as I can.

Yours, respectfully,

C. GIBSON.

This was all the evidence in the case. The case was tried by the court sitting as a jury.

Instructions by defendant.

The defendants asked the following instructions: The patent to Mary McRee is void, and passes no title to her.

B. A. HILL, *For Def't.*

The recitals in the patent that Mary McKee is the assignee by intermediate conveyances of the title of James Y. O'Carroll are not any evidence of that fact.

B. A. HILL, *For Def't.*

The patent is in law to James Y. O'Carroll and his legal repre-
434 sentatives, and the plaintiff is bound to show her derivative title from James Y. O'Carroll to entitle her to recoverin this action.

B. A. HILL, *For Def't.*

All any every of the orders, decisions, and acts of the recorder of land titles, of surveyor-general, the Commissioner, and Secretary of the Interior made after the date of the patent to Mary McRee, as the assignee of James Y. O'Carroll, are null and void.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find from the evidence that the survey of the said New Madrid claim for location in the name of James Y. O'Carroll was not returned by the surveyor-general to the recorder of land titles before the year 1841, then the said location is void, and the patent issued thereon is void.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find that the deeds and documentary evidence read in evidence by the defendant are genuine, then the defendant has shown a title to the land sued for in himself, if the said patent vests any title in James Y. O'Carroll or his legal representatives.

B. A. HILL, *For Def'ts.*

If the court, sitting as a jury, find from the evidence that the defendant Pierre Chouteau, jr., has had and held open, notorious, and contin-
435 uous possession of the premises sued for, claiming to own the same in his own right, and to possess the same adversely to all other persons, for twenty years prior to the commencement of this suit, the plaintiff cannot recover in this action.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find from the evidence that the defendant, Pierre Chouteau, jr., has had and held open, notorious, and continuous possession of the premises in question sued for, claiming to own the same in his own right and to possess the same adversely to all other persons for ten years prior to the commencement of this suit, the plaintiff cannot recover.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find from the evidence that Mary McRee is the widow and devise' of Samuel McRee, joining with his said wife, conveyed all his intent and title in and to the sixty-four acres sued for to the defendant, Pierre Chouteau, by the deed acknowledged on the 31st day of October, 1839, and filed for record on the 8th day of November, 1839, then the plaintiff cannot recover.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find from the evidence that the patent given in evidence by the plaintiff was issued upon the claim for loca-
436 tion in the name of James Y. O'Carroll, then the said patent *erriers* to the benefit of James Y. O'Carroll and his legal representatives, and the plaintiffs cannot recover the land conveyed to Pi. Chouteau, jr., by Sam'l McRee and wife.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find from the evidence that the claim for the location in the name of James Y. O'Carroll, and the patent issued

thereon and given in evidence in this case covers any part of the field of the Barriere des Noyers, or the Cul de Sac, or the St. Louis commons, belonging to the town of St. Louis in 1812 and 1862, then the said location and patent are void.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find from the evidence that the patent issued on the claim for the New Madrid location, in the name of James Y. O'Carroll to Mary McRee, covers in its whole extent land that must lie within, and be contained within, an out boundary line, ran so as to include all the common fields and commons, field lots and village lots, in, adjoining, and belonging to the town, now city, of St. Louis, in 1812, then the said patent is void.

B. A. HILL, *For Def't.*

The patent to Mary McRee, as assignee of James Y. O'Carroll, shows upon its face that the New Madrid location covers a portion of the
437 St. Louis commons confirmed by the act of June 13th, 1812, and certain field lots in the Cul-de-Sac prairie, also confirmed to inhabitants of St. Louis, and that the part of said O'Carroll's location, lying west of the St. Louis commons, is situated between the Barriere des Noyers common fields and the Cul-de-Sac field lots; and if the court, sitting as a jury, find from the evidence that an outboundary line so run as to include the Barriere des Noyers commons fields and the Cul-de-Sac field lots on the 13th day of June, 1812, and also the out-lots, common field lots, and commons belonging to the town of St. Louis on said day, would include the land in the O'Carroll location, then the said location is void, and the said patent is void.

B. A. HILL, *For Def't.*

If the court, sitting as a jury, find from the evidence that when the patent read in evidence in this cause was issued, Mary McRee was not the owner of the injured lands in lieu of which the said patent issued, and that the sixty-four acres of land included in said patent and sued for in this action was conveyed to said Pierre Chouteau, jr., by Samuel McRee and Mary, his wife, the grantor of present plaintiff, as a portion of the said New Madrid location; and if the court further finds from the evidence that the said defendant, Pierre Chouteau, jr., has a derivative title, by
438 genuine deeds given and read in evidence, to the sixty-four acres of land sued for, from the original location of New Madrid certificate, in the name of James Y. O'Carroll down to himself, then the plaintiff cannot recover.

B. A. HILL,
Attorney for Defendant.

The patent to Mary McRee is only prima facia evidence of title in the said Mary McRee, and the title to the land located by virtue of the certificate and patent shall be determined according to the rights of the parties to the land, as located by virtue thereof; and if Pierre Chouteau, jr., was the owner, at the time of the commencement of this suit, of the sixty-four acres of land sued for, by virtue of good and sufficient deed or deeds, then the plaintiff cannot recover.

B. A. HILL, *For Def't.*

If Pierre Chouteau, jr., acquired the land sued for of Samuel McRee and Mary, his wife, and said Mary, grantor of plaintiff, had no other title to the O'Carroll location than through the devise of her said husband, then Pierre Chouteau, jr., was the owner of the said land sued for within the meaning of the 14th instruction, at the time this suit was brought.

B. A. HILL, *For Def't.*

All of which the court refused to give, and which refusal defendants at the time excepted.

439 The court, on its own motion, then gave the following instructions:

Instruction by the court.

GIBSON
vs.
CHOUTEAU.

The effect of the patent issued by the United States to Mary McRee was to invest her with the legal title to the land in dispute; and the title vested in the plaintiff through the deed to him from Mary McRee is superior to any title shown by the defendant to the land in question, under New Madrid certificate No. 150; and said patent having issued to said Mary McRee within ten years next before the commencement of this suit, the possession of said defendant is no bar to the plaintiff's recovery.

Jan'y, 1865.

C. B. LORD.

To the giving of which defendant at the time excepted.

The court thereupon found a verdict for the plaintiff.

In due time the defendant filed their motion and reasons for new trial, as follows:

Motion for new trial.

In the St. Louis land court. October term, 1864.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU AND ALS.

440 And now comes the said defendants and move the court to set aside the judgment in this court and grant a new trial in this cause, for the following reasons:

1st. Because the court admitted improper and illegal testimony offered on part of plaintiff.

2nd. Because the court refused to admit proper and legal testimony offered on part of defendant.

3rd. Because the court gave illegal and improper instructions asked by plaintiff.

4th. Because the court refused to give legal and proper instructions asked by defendants.

5th. Because the court, on its own motion, gave illegal and improper instructions and declarations of law covering the case.

6th. Because the verdict is against law, against evidence, and against the weight of evidence.

7th. Because upon the whole case the verdict should have been for defendant.

B. A. HILL,
GLOVER AND SHEPLEY,
For Def't.

Which the court overruled, and to which overruling the defendants at the time excepted, and file this their bill of exceptions, and pray that the same may be allowed; which is accordingly done.

C. B. LORD.

441 And afterwards the following further proceedings were had in this cause, to wit:

Affidavit for appeal, and bond filed, and appeal granted.

March term, 1865. Monday, March 13th, 1865.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL. } Appeal to the supreme court.

Now at this day there is filed in this cause an affidavit for appeal, and also an appeal bond, as required by the court, in the sum of twenty-five hundred dollars; which bond, on motion of defendant's attorney, is approved by the court nunc pro tunc of February 27th, 1865, and acknowledged by the principal and securities; and thereupon an appeal to the supreme court is granted the defendant from the decision herein rendered.

Which affidavit for appeal and bond are in the words and figures following, to wit:

Affidavit for appeal.

St. Louis land court.

CHARLES GIBSON
vs.
PIERRE CHOUTEAU, JR., ET AL.

Charles P. Chouteau, agent of Pierre Chouteau, jr., being duly sworn, upon his oath says that the appeal prayed for in this cause is not
442 taken for vexation or delay, but because affiant believes the said Pierre Chouteau is aggrieved by the judgment and decision of this court.

CHARLES P. CHOUTEAU.

Sworn to and subscribed before me this 13th day of March, 1865.
ROBERT WHITE, *Clerk,*
By E. P. WALSH, *Deputy.*

Bond.

Know all men by these presents, that we, Charles P. Chouteau, agent for Pierre Chouteau, jr., as principal, and Britton A. Hill and Jules Valle, as securities, are held and firmly bound unto Charles Gibson in the sum of twenty-five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at St. Louis, this day of March, A. D. 1865.

The condition of the above obligation is such that whereas Pierre Chouteau, jr., has appealed from the judgment rendered against him and in favor of said Charles Gibson, in the St. Louis land court, for the sum of six hundred dollars damages, and fifty dollars per monthly rents, and profits of premises, together with costs:

443 Now if the said appellant will pay all costs and damages that may be awarded against him, occasioned by such appeal, and shall prosecute his appeal and stay waste, and shall perform such judgment as shall be given by the supreme court, and such as the supreme court may direct the St. Louis land court to give, an' shall, if the judgment, or any part thereof, be affirmed, comply with and perform the same, so far as it may be affirmed, and pay all damages and costs which may be awarded against him by the supreme court, then this obligation shall be void; otherwise it shall remain in full force and effect.

CHARLES P. CHOUTEAU. [SEAL.]
JULES VALL. [SEAL.]
BRITTON A. HILL. [SEAL.]

Approved by the court nunc pro tunc of Feb'y 27th, 1865.

ROBERT WHITE, *Clerk*,
By E. P. WALSH, *Deputy*.

St. Louis land court, March term, 1865.

Be it remembered that on this thirteenth day of March, 1865, personally appeared Charles P. Chouteau, the principal, and Jules Valle and Britton A. Hill, the securities, in the foregoing bond, and acknowledge that they executed the same for the purposes therein expressed.

444 In witness whereof I hereunto set my hand and affix the seal of said court, at office, in St. Louis, the day and year last aforesaid.

ROBERT WHITE, *Clerk*.

STATE OF MISSOURI,
County of St. Louis, ss:

I, Robert White, clerk of the St. Louis land court, certify the foregoing transcript to be a true and correct copy of the record and proceedings, as required, had in the case of Charles Gibson, plaintiff, and Pierre Chouteau, jr., et al., defendants, as fully as the same remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this thirteenth day of September, A. D. 1865.

[L. S.]

ROBERT WHITE, *Clerk*,
By CHAS. LEVY, *D. C.*

[U. S. Stamp.]

Also the record & proceedings of the same case in the supreme court of the State of Missouri, as follows:

And afterwards, to wit, upon the 24th day of October, A. D. 1865, the following further proceedings were had in this cause, to wit:

445 *Assignment of errors filed.*

October term, 1865. Tuesday, October 24th, 1865.

(On the margin :) Gibson vs. Chouteau et al. Supreme c't of Mo. Transcript of record.

* * * * *vs.* * * * *
* * * * " * * * *
GIBSON " CHOUTEAU.
* * * * " * * * *
* * * * " * * * *

Assignment of errors filed.

And afterwards, to wit, upon the 22nd day of November, A. D. 1866, the following further proceedings were had, to wit :

October term, 1866. Thursday, Nov. 22nd, 1866.

Agreement filed.

CHARLES GIBSON, RESPONDENT,
vs.
PIERRE CHOUTEAU, JR., C. P. CHOUTEAU, AND John Cook, appellants.

Agreement to supply record filed.

Which agreement was in the words and figures following, to wit :

Agreement.

In the supreme court of Missouri.

CHARLES GIBSON, RESPONDENT,
vs.
CHARLES P. CHOUTEAU AND MAFFIT, REPRESENTATIVES of Pierre Chouteau, jr. } No. 128. Oct. t., 1866.

The parties consent that the documents hereto annexed be made a part of the record in this case, with the same effect as if incorporated in the same. The said documents relate to the claim and confirmation to
446 James Y. O'Carroll, in New Madrid County, and they shall be copied by the clerk of this court as a part of the record in any transcript

that may be made out to be sent to the Supreme Court of the United States, and inserted in said record, on page 29 of the printed record.

St. Louis, Nov. 22d, '66.

BRITTON A. HILL,
Att'y for App'l'ts.
C. GIBSON.

Which said documents are in words and figures following, to wit:

(For copy of s'd documents see pages 133–148, inclusive, of this transcript, down to signature of M. Rey.)

And afterwards, to wit. at the October term of said court, A. D. 1866, the following further proceedings were had in this cause, to wit:

Arg'm't progressed.

FRIDAY, *November 23rd*, 1866.

CHARLES GIBSON, RESPONDENT,
vs.
PIERRE CHOUTEAU, JR., C. P. CHOUTEAU, AND John Cook, appellants.

Now again come the parties, by their attorneys, whereupon the argument progressed, but not being concluded is laid over till Monday, the 26th instant.

And afterwards, to wit, at the same term of said court the following further proceedings were had in said cause, to wit:

447 *Arg'm't concluded.*

MONDAY, *November 26th*, 1866.

CHARLES GIBSON, RESPONDENT,
vs.
PIERRE CHOUTEAU, JR., C. P. CHOUTEAU, and John Cook, appellants.

Now again come the parties, by their respective attorneys, and thereupon the argument in this case progresses, and being finished this cause is submitted to the court; statements and briefs of appellants filed.

And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

Judgment of affirmance.

Appeal from St. Louis land court.

MONDAY, *Dec.* 3, 1866.

CHARLES GIBSON, RESP.,
vs.
PIERRE CHOUTEAU, JR., C. P. CHOUTEAU, and John Cook, app'ts.

Now again come the parties aforesaid, by their respective attorneys, and the court, being no' sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis land court be in all things affirmed, and stand in full force and effect, and that the said respondent recover of the said appellants his costs and charges herein expended, and have execution therefor. Opinion filed.

448 And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

Motion for rehearing filed.

FRIDAY, *Dec'r 7th,* 1866.

CHARLES GIBSON, RESP'T,
vs.
PIERRE CHOUTEAU, JR., ET AL., APP'TS.

Now again come the said appellants, by their attorneys, and file their motion to set aside the judgment heretofore entered in this cause, and for a rehearing therein; which motion is in the words and figures following, to wit:

Motion for a rehearing.

GIBSON
vs.
CHOUTEAU. } No. 128. Oct. t., 1866.

To the honorable justices of the supreme court of Missouri:

The defendant in this cause now comes and moves the court to grant a rehearing herein, and in doing so he does not propose to ask the court to review any of the questions which in the opinion given in this cause have been examined, but upon one upon which the court have pronounced no opinion, and the determination of which affects not only the land in controversy, but necessarily involves the very grave question whether
449 in the case of confirmations under different acts of Congress, which acts provide for the issuing of a patent, the statutes of limitations does not commence running until the patent actually emanates from the United States. There are many lots of ground in the city and its vicinity,

confirmed under various acts of Congress where no patent has ever issued, and yet where actions of ejectment have been under our statute maintained, and the statute of limitations, as a defence, has been set up and admitted to be a good defence. We apprehend that it is certain that this judgment cannot be allowed to stand without directly reversing the case of Cabanne vs. Lindell, in the 12 Mo. R. 184, and that of Givens vs. Gray, 26 Mo. R., page 300, both decided by the supreme court of the State, and commencing as far back as the year 1848; as well as the cases of Bagnell vs. Broderick, 13 Peters; Barry vs. Gamble, 3 How., 51; and Lessieur vs. Price, 12 Howard, 74, which cases, in the United States court, conclusively hold that the right to the new-located land passed, by operation of law, when the survey of newly-located land was filed in the office of the recorder of land titles, and that at the same time the title to the injured land passed to the United States, thus affecting, as the court have said, an ex-
450 change of land between the two proprietors, the United States on the one hand and James Y. O'Carroll' legal representatives, on the other.

The question becomes more grave because, by the decision in this case, no notice has been taken of it, and it will be said in the Supreme Court of the United States that the supreme court of the State has virtually, if not directly, overruled the cases of Cabanne vs. Lindell and Gray vs. Givens; and that, as this was a decision of the highest court of the State upon a local statute, that decision is conclusive upon the courts of the United States.

Again, in order to give the Supreme Court of the United States jurisdiction, the decision must be against the validity of some act of Congress, &c.

1st. The action of ejectment would lie, title ejectment on a New Madrid location. By all the authorities, State and Federal, the location became perfect on the return of the survey to the recorder of land titles. (See cases above cited.)

2d. In the decision filed in this case it is held that the return of the survey in 1841 to the recorder was operative, and that the proceedings subsequent to annul the patent certificate of 1841 were simply void. (See opinion.)

The exchange of the new location for the lands injured by earth-
451 quakes was effected in 1841. Mr. Chouteau was then in possession of the locus in quo by color of title, by recorded deeds; and whomsoever held the title, right, or claim to the new location in 1841, Mr. Chouteau held adversely to him by substantial enclosures and houses. From that day in 1841 to the day this suit was commenced in 1862, the def't continued in possession, a period of 21 years, open, notorious, and adverse.

Gray v. Givens, 26 Mo., 300, approving Lindell vs. Cabannee, 12 Mo., 184, and Biddle vs. Mellon, 13 Mo., and basing the decision on the cases of Bagnell vs. Broderick, 13 Peters; Barry vs. Gamble, 3 How., 51, and Lessieur vs. Price, 12 How.

The constitutional question is fully considered, and the right of the State to pass laws for the limitations of actions of ejectment in such cases is distinctly affirmed. Altogether the cases of Gray vs. Givens and Cabanne vs. Lindell cannot stand if the case at bar be held not to furnish a defence under the statute of limitations.

Gray vs. Givens, 26 Mo., expressly decides that in this case the statute is a complete defence.

3d. The logical conclusion to be drawn from the cases is, that the new location, being perfected 1841, the exchange, by operation of law,
452 was concluded between the U. States and the leg. rep's of James Y. O'Carroll, and the United States had no further interest, and the issue of the patent in 1862 was a mere form, and it related back to the day of the exchange in 1841 and passed the title to the legal rep's of James Y. O'Carroll as of that day.

See Sanders vs. Brant, 10 How., where the Sup. Ct. of the U. States held that a patent issued to J. Clamorgan in 1845 related back to the reception of the proceedings in 1806, and passed the title as of that date.

4th. The equitable title or claim would under our statute pass by limitations as perfectly as the legal estate.

Whatever equity McRee had in 1838, when he made the deed to Chouteau for a part of the certificate, to wit, 64 acres, passed by the deed, and McRee had the same equity then that he had in 1846, when the decree was entered. Mr. Chouteau's possession under that deed for twenty years adjoining the said McRee and his devisee, operates under the case of Biddle vs. Mellon, 13 Mo., to give Mr. Chouteau a title to everything that McRee might have conveyed. If McRee had an equity it passed; if he or any one else had a legal estate it passed by the force of the possession for 20 years.

453 We sincerely hope that a rehearing in this case may be ordered, so as to give us an opportunity of considering the questions at issue, which are of such magnitude as to demand a thorough and exhausting examination.

We have the honor to be, most respectfully, your ob't serv'ts,

JOHN R. SHEPLEY AND
BRITTON A. HILL,
Of Counsel for Devisees of P. Chouteau.

And afterwards, at the same term of the court, the following further proceedings were had in this cause, to wit:

Rehearing granted.

MONDAY, *Dec.* 10, 1866.

CHARLES GIBSON, RESP.,
vs.
PIERRE CHOUTEAU, JR., ET AL., APP'TS.

The court having heard and fully considered the motion to set aside the judgment heretofore entered in this cause, and for rehearing herein, doth sustain the same. It is therefore ordered that the judgment heretofore entered in this cause be, and the same hereby is, set aside, and that this cause be docketed for a new hearing.

Opinion filed Dec'r 10, 1866, and on said opinion is indorsed these words:

Rehearing granted on the question of the statutes of limitations.

HOLMES.

454 And afterwards, to wit, at the March term of said court, 1867, the following further proceedings were had in this cause, to wit:

Reargument progressed.

THURSDAY, *March* 21, 1867.

CHARLES GIBSON, RESP'T,
vs.
PIERRE CHOUTEAU, JR., ET AL., APP'TS.

Now again come the parties aforesaid, by their respective attorneys, whereupon the argument progressed; but, not being concluded, is laid over till to-morrow, Friday, the 22d inst.

And afterwards, to wit, at the same term of this court, the following proceedings were had in this cause, to wit:

Reargument concluded.

FRIDAY, *March* 22, 1867.

CHARLES GIBSON, RESP.,
vs.
PIERRE CHOUTEAU, JR., ET AL., APP'TS.

Now again come the parties, by their attorneys, and thereupon the argument progresses, and, being finished, is submitted to the court.
Brief of respondent and brief of appellant filed.

And afterwards, to wit, at the same term of said court, the following proceedings were had in said cause, to wit:

455 *Judgment of reversal.*

MONDAY, *April* 1*st*, 1876.

CHARLES GIBSON, RESP.,
vs.
PIERRE CHOUTEAU, JR., ET AL., APP'TS.
Appeal from St. Louis land court.

Now again come the parties by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the St. Louis land court be reversed, annulled, and for naught held and esteemed, that the respondent take nothing by this suit in this behalf, but that the appellants go thereof without day, and recover of the said respondents their costs and charges herein expended, and have execution therefor.
Opinion filed.

And afterwards, to wit, at the March term, 1869, of said court, the following further proceedings were had in this cause, to wit:

APRIL 26, 1869.

CHARLES GIBSON, RESP.,
vs.
PIERRE CHOUTEAU, JR., ET AL., APP'TS.

Now again comes the respondent in proper person, and suggests and shows to the court that there is a diminution in the record herein,
456 and moves the court that it order an entry nunc pro tunc to amend the same.

Motion filed.

And afterwards, to wit, at the October term, 1869, of said court the following further proceedings were had in this cause, to wit:

OCTOBER 19, 1869.

CHARLES GIBSON, RESPONDENT,
vs.
CHARLES P. CHOUTEAU, ET AL., DEVISEES. of Pierre Chouteau, deceased, appellants.

The court having heard and fully considered the motion of the respondent for a nunc pro tunc judgment, filed at the March term, 1869, of this court, and held under advisement until the present term, sustains the same.

And it appearing to this court that its order herein of the 10th day of December, 1866, setting aside the judgment of affirmance rendered in this cause on the 3d day of December, 1866, and ordered docketed for a rehearing, was made upon the question of the statute of limitations, and that the clerk, by omission or clerical mistake, failed to enter the order as made by the court.

It is therefore ordered that the same be set aside, annulled, and for naught held and esteemed, and that in lieu thereof the following
457 order is made as of the tenth (10th) day of December, A. D. 1866.

CHARLES GIBSON, RESP.,
vs.
CHARLES P. CHOUTEAU ET AL., DEVISEES OF Pierre Chouteau, deceased.

The court having heard and fully considered the motion of the appellants to set aside the judgment of affirmance in this cause, and for a rehearing herein on the question of the statute of limitation, doth sustain the same.

It is therefore ordered that the judgment of affirmance rendered in this cause be, and the same is hereby, set aside, and that this cause be docketed for a rehearing on the question of the statute of limitation only.

And it further appearing to this court that its judgment of reversal ordered in this cause at its March term, 1867, was rendered on the question of the statute of limitation only, and that by clerical error such fact was not stated therein:

It is therefore ordered that such judgment of reversal be, and is hereby

set aside, annulled, and for naught held and esteemed, and in lieu thereof the following judgment is hereby rendered as of the 1st day of April, 1867.

458 CHARLES GIBSON, RESP.,
vs.
CHAS. P. CHOUTEAU ET AL., DEVISEES, &C., APP'TS.

Now, again come the parties by their respective attorneys, and submit this cause to the court on the question of the statute of limitation. And the court being sufficiently advised of and concerning the premises, doth consider and adjudge that the respondent is barred by the statute of limitations, all other questions herein being held and determined in his favor.

Wherefore, it is ordered that the judgment rendered herein by the St. Louis land court, be rendered, annulled, and for naught held and esteemed and that the respondent take nothing by his suit in this behalf, but that the appellants go thereof without day and recover of the respondent their costs and charges expended herein, and have execution therefor.

Opinion filed.

And afterwards, to wit, on the 26th day of April, A. D. 1870, the following bond was filed in this cause, to wit:

Bond.

Know all men by these presents that we, Charles Gibson, as principal, and William G. McRee, are held and firmly bound unto Charles
459 P. Chouteau and Julia Maffitt, devisees of Pierre Chouteau, deceased, in the full and just sum of one thousand dollars, to be paid to the said Charles P. Chouteau and Julia Maffitt, devisees of Pierre Chouteau, deceased, their heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourseeves our heirs, executors, and administrators, jointly and severally, by these presents; sealed with our seals, and dated the seventh day of January, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, at the October term, 1869, of the supreme court of the State of Missouri, in a suit depending in said court between Charles Gibson, plaintiff, and Charles P. Chouteau and Julia Maffitt, devisees of Pierre Chouteau, deceased, defendants, judgment was rendered against the said Charles Gibson, plaintiff, as at the March term, 1867, of said court; and the said Charles Gibson, plaintiff, having obtained a writ of error of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles P. Chouteau and Julia Maffitt, devisees aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such that if the
460 said Charles Gibson shall prosecute said writ to effect and answer

all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

W. GIBSON. [SEAL.]
W. G. McREE. [SEAL.]

Approved by—

DAVID WAGNER,
Presiding Judge, Sup. Ct. Mo.

(Indorsed:) Charles Gibson, pl'ff in error, vs. Charles P. Chouteau & others, def'ts in error. Bond on appeal. Filed April 26th, 1870.
O. T. FISHBACK, *Clerk*,
Per J. F. BAIER, *D. C.*

Also the record and proceedings of the same case in the Supreme Court of the United States, as follows:

(On margin:) Gibson vs. Chouteau et al. Sup. Ct. of U. S. Transcript of record.

And afterwards, to wit, at the March term, 1872, of said court, and on the 11th day of April, 1872, the following further proceedings were had in this cause, to wit:

CHARLES GIBSON, RESPONDENT,
vs.
CHARLES P. CHOUTEAU ET AL., APP'L'TS.

Now again comes the respondent, in his own proper person, and files his motion to affirm the judgment of the St. Louis land court rendered
461 herein in compliance with a mandate from the Supreme Court of the United States, ordering that the judgment heretofore rendered in this cause by this court be reversed, and that said respondent recover of said appellants the sum of one hundred and eighty-five dollars and eighty-six cents ($185.86) for his costs, and that he have execution therefor.

(Mandate from the Supreme Court of the United States filed.)

And which said mandate from the Supreme Court of the United States, filed as aforesaid, is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Missouri, greeting:

{ SEAL OF THE SUP. CT. OF U. S. } Whereas lately, in the supreme court of the State of Missouri, before you or some of you, in a cause between Charles P. Chouteau and Julia Maffitt, devisees of Pierre Chouteau, deceased, appellants, and Charles Gibson, appellee, wherein the judgment of the supreme court entered in said cause on the first day of April, A. D. 1867, is in the following words, viz:

"Now again come the parties, by their respective attorneys, and
462 submit this cause to the court on the questions of the statutes of limitations.

"And the court being sufficiently advised of and concerning the premises, doth consider and adjudge that the respondent is barred by the statute of limitations, all other questions herein being held and determined in his favor.

"Wherefore it is ordered that the judgment rendered herein by the St. Louis land court be reversed, annulled, and for naught held and esteemed, and that the respondent take nothing by this suit in this behalf, but that the appellants go thereof without day, and recover of the respondent their costs and charges expended herein and have execution therefor," as by the inspection of the transcript of the record of said supreme court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and seventy-one, the said cause came on to be heard before the Supreme Court of the United States on the transcript of the record, and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this court that the judgment of
463 the said supreme court in this cause be, and the same is hereby, reversed with costs, and that the said appellee, Charles Gibson, recover against the said appellants one hundred and eighty-five dollars and eighty-six cents for his costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings to be had therein, in conformity with the opinion of this court 5th February, 1872.

And the same is hereby remanded to you, the said judges of the supreme court, in order that such execution and further proceedings may be had in the said cause in conformity to the judgment and decree of this court above stated, as according to the right and justice and the Constitution and laws of the United States ought to be had therein, the said writ of error notwithstanding.

Witness the honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy-one.

Costs of appellee: Clerk, $165.86; attorney, $20.00—185.86. Taxed by D. W. Middleton, clerk of the Supreme Court of the United States.

464 (Endorsed:) No. 73. December term, 1871. Mandate. Supreme Court of the United States. Gibson vs. Chouteau et al. Filed April 11th, 1872. Francis Minor, cl'k, per J. F. Baier, d. c.

Attached to said mandate is the following:

Supreme Court U. S. December term, 1871.

Costs of Charles Gibson in No. 73.

1869: Ent. ac., 56; fil. wr., 40; allow., 40; cit., 40; serv., 40; bond and app., 68; ars. of ev., 40; pray., 40; rec., 100; cert., 40; doc., 40; fee bond and ent. sec., 1.52; rec. tr., 84. December term: Ap., 21; rec., 28; pre., 40; ord., 28; con., 14. 1870, Dec. T.: Ap., 21; rec., 28; rec., 40;

rec., 40; pa., 1.20; br., 6.00; moror., 56; arg., 56; ord., 28; con., 14. 1871, Dec. T.: Ap., 21; mo., 28; jud., 1.64½; fil., 40; rec. pr., 56; mo. and en., 56; mand., 5.98½; record, 136.52; co. and co., 56—$165.86.

$165.86. Fee-book L, pa. 311.

Test:

D. W. MIDDLETON,
C. S. C. U. S.

1872, Mar. 22.

Rec'd pay't per M. Blair, esq.

D. W. MIDDLETON,
C. S. C. U. S.

And which said motion to affirm judgment of the land court is in words and figures as follows:

In the supreme court of Missouri. March term, 1872.

CHARLES GIBSON, APPELLEE,
vs.
CHARLES P. CHOUTEAU AND MRS. JULIA MAFFITT, appellants.

465 The appellee files herewith the opinion and the mandate of the Supreme Court of the United States, reversing the judgment rendered by this court against him on the question of limitation, at the October term, 1869, and remanding the cause to this court, and all other questions herein being held and determined in his favor, and nothing being now open for consideration, he now prays this court to affirm the judgment of the St. Louis land court herein rendered.

C. GIBSON.

Served this notice in the city of St. Louis by delivering a true copy of the same to Charles P. Chouteau and Mrs. Julia Maffitt, the within-named defendants. Done this 16th day of April, 1872.

O. S. FULLER,
Marshal of the Supreme Court of the State of Mo.

Fee, $1.00, paid by C. Gibson.

(Endorsed:) Charles Gibson vs. Charles P. Chouteau et al. Motion to affirm judgment of the land court. Filed April 11th, 1872. Francis Minor, cl'k, per J. F. Baier, d. c.

And afterwards, to wit, at the same term and on the 22nd day of April, 1872, the following further proceedings were had in this cause, to wit:

466 CHARLES GIBSON, RESPONDENT,
vs.
CHARLES P. CHOUTEAU, APP'L'TS.

Opinion of the Supreme Court of the United States filed; and which said opinion is in words and figures as follows:

In the Supreme Court of the United States. December term, 1871.

CHARLES GIBSON, PLAINTIFF IN ERROR,
vs.
CHARLES P. CHOUTEAU AND JULIA MAFFITT, devisees of Pierre Chouteau, deceased. } No. 73.

In error to the supreme court of the State of Missouri.

1. Statutes of limitation of a State do not apply to the State itself, unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included, and they do not apply to the United States.

2nd. The power of Congress in the disposal of the public domain cannot be interfered with, or its exercise embarrassed by any State legislation, nor can such legislation deprive the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title, after the initiation of proceedings for its acquisition.

467 3rd. The patent is the instrument which, under the laws of Congress, passes the title of the United States, and in the action of ejectment in the Federal courts for lands derived from the United States the patent, when regular on its face, is conclusive evidence of title in the patentee.

And in the action of ejectment in the State courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent is also conclusive.

4. The occupation of lands derived from the United States before the issue of their patent for the period prescribed by the statutes of limitation of a State for the commencement of actions for the recovery of real property is not a bar to an action of ejectment for the possession of such lands founded upon the legal title subsequently conveyed by the patent, nor does such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed, whether asserted in a separate suit in a Federal court, or set up as an equitable defence to an action of ejectment in a State court.

5. The doctrine of relation is a fiction of law adopted by the court solely for the purpose of justice; and where several proceedings are re-
468 quired to perfect a conveyance of land; it is only applied for the security and protection of persons who stand in some privity with the party that initiated the proceedings, and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right by any valid transfer from the original or any subsequent holder.

Mr. Justice Field delivered the opinion of the court.

This is an action of ejectment for the possession of certain real property, consisting of sixty-four acres, situated in the county of St. Louis, in the State of Missouri. The plaintiff asserts title to the demanded premises under a patent of the United States issued to his immediate grantor. The patent is founded upon a location made by the representatives of one James Y. O'Carroll under the act of Congress of February 17th, 1815,

passed for the relief of parties whose lands in the county of New Madrid, in the then Territory of Missouri, had been in 1812 materially injured by by earthquakes. (3 Stats. at Large.)

The location was made in June, 1818, on behalf of one Christian Wilt, who had succeeded to the interest of O'Carroll. The land had been previously surveyed by the deputy surveyor of the Territory, and, in 1841, the survey and plat thereof were returned to the recorder, who
469 issued thereon a patent certificate in favor of O'Carroll or his legal representatives. This survey did not meet the approval of the Commissioner of the General Land Office, as it did not show its interferences with conflicting claims, and, under his instructions, a new survey and plat were made in 1862, upon which the patent issued.

On the trial the defendants endeavored to show that they had become, through certain legal proceedings, the owners of the interest which Christian Wilt originally possessed (Omission here. See 13 Wal.; insert from it the omission as therein stated), and consequently had acquired the equitable title to the land, upon which they could defend against the patent, under the practice which prevails in Missouri. But in this showing they failed, the supreme court of the State holding that the conveyances under which they claimed were inoperative and void. The defendants also relied upon a deed of Samuel McRee and wife, executed in 1838, contending that, by operation of the deed, under the statutes of Missouri the equitable title afterwards acquired by the grantors, and the legal title conveyed by the patent, enured to their benefit; but the supreme court held that the deed only had the effect of a quit-claim of an existing interest, and did not effect any subsequently acquired title.

470 The rulings of the State courts upon these grounds are not open to review in this court, as they involve no questions of Federal jurisdiction. But it also appeared in evidence that the defendants previous to the issue of the patent had been in possession of the demanded premises more than ten years, the period prescribed by the statute of Missouri within which actions for the recovery of real property must be brought. By the statutes of the State the action of ejectment will lie on certain equitable titles. It may be maintained on a New Madrid location against any person not having a better title. The defendant therefore contended that the statute of limitation, which had run against the equitable title created by the location of the O'Carroll claim, was also a bar to the present action founded upon the legal title acquired by the patent of the United States, and in this position they were sustained by the supreme court of the State, reversing the decision in that respect of the inferior court where the action was brought.

It is matter of common knowledge that statutes of limitation do not run against the State; that no laches can be imputed to the king, and that no time can bar his rights was the maxim of the common law, and was
471 founded upon the principal of public policy that as he was occupied with the cases of the Government he ought not to suffer from the negligence of his officers and servants. (Gen. Stats. of Mo. of 1865, chap. 151, secs. i and ii.)

The principal is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of interests and property of the public. It is upon this principal that in this country the statutes of a State prescribing periods within which rights must be

prosecuted are not held to embrace the State itself, unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from operation of such statutes. (U. S. vs. Hoor, 2 Mason, 312; People vs. Gilbert, 18 Johns, 228.)

With respect to the public domain the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this
472 right, or embarrass its exercise; and to prevent the possibility of any attempted interference with it a provision has been usually inserted in the compacts by which new States have been admitted into the Union that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause, that the legislature shall not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers."

The same principal which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the Government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal
473 in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited, because they were not asserted before that title was issued. Yet such forfeiture is claimed by the defendants in this case, and is sanctioned by the decision of the supreme court of Missouri. That court does not, it is true, present its decision in this light, but on the contrary it attempts to reconcile its decision with positions substantially such as we have already stated respecting the power of Congress over the public lands, and the inability of the State to interfere with the primary disposal of the soil of the United States.

It declares it to be well settled that statute of limitation of a State cannot run against the United States nor effect their grantees until the title has passed from the proprietary sove'ignty; that these statutes operate to bar the cause of action, not to convey the title; that no cause of action upon a right of entry by virtue of the legal title by patent can exist until the patent is issued, and that the action upon the equitable title created by the location is only given by a statute of the State; and as the two rights of entry have a different origin, that the latter, resting on the statute, might be barred, whilst that resting on the patent would continue in force
474 but for the operation of the fiction of relation. By a novel application of the doctrine, the court comes to the conclusion that the statute operates against both rights of entry at the same time.

By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent which was issued in 1862 is said to take effect by relation at the time when the survey and plat of the location made in 1818 were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date. (Lessiuer vs. Price, 12 How., 74.)

475 The supreme court of Missouri, considering that by this doctrine of relation the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title," said the court, "in making this circuit necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way and cut off with that which existed before." (39 Missouri, 588.) The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title. (Bernal vs. Lynch, Wall., 515; Jackson vs. Bard, 4 John., 230; Heath vs. Ross, ibid., 140; Littleton vs. Cross, 5 Barnwell Cres., 325, 328.)

The defendants in this case were strangers to that party and to his equitable claim or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder.

476 The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the State. It left the right of entry upon the legal title subsequently acquired by patent wholly unaffected. In the Federal courts, where the distinction between legal and equitable proceedings is strictly maintained, the remedies afforded by law and equity are separately pursued; the action of ejectment can only be maintained upon the possession *of* the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the Government conveyance. If other parties passes equities superior to those of the patentee upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title or enjoining its enforcement or cancelling the patent. But in the action of ejectment in the Federal courts the legal title must prevail, and the patent, when regular on its face, is

conclusive evidence of that title. So also in the action of eject-
477 ment in the State courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail; for, as said in Bagnall vs. Broderick (13 Pet., 450)," Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government, which by the patent passes the grantee, and he is entitled to recover the possession by ejectment."

In several of the States, and such is the case in Missouri, equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defence to the action of ejectment. The answer or plea in such case is the nature of a bill in equity, and should contain all its essential averments. The defendant then becomes with reference to matters averred by him an actor, and seeks, by the equities presented, to estop the plaintiff from prosecuting the action, or to compel a transfer of the title. (Stephenson vs. Smith, 7 Mo., 610; Barry vs. Gamble, ib., 881; Cunningham vs. Ashley, 14 How., 377; Lindsey vs. Hare, 2 Black., 554; Hart vs. Starr, 6 Wal., 402; Johnson vs. Townsley, 12 Wall.)

In Maguire vs. Tice, where the plaintiff brought ejectment on a
478 legal title and gave in evidence a patent of the United States, and the defendant relied upon an equitable defence, the supreme court of Missouri said, "Although our present practice act abolishes all distinction between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party, by his pleadings, sets forth a merely legal title he cannot, on the trial, be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it, and this must be done whether he is seeking relief as plaintiff or defendant."

But neither in a separate suit in a Federal court nor in an answer to an action of ejectment in a State court can the mere occupation of the demanded premises by plaintiffs or defendants for the period prescribed by the statute of limitations of the State be held to constitute a sufficient equity in their favor to control the legal title subsequently con-
479 veyed to others by the patent of the United States without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted.

(Estranda vs. Murphy, 19 Cal., 272; Weber vs. Manhold, ibid, 457; Estrade vs. Barter, ibid, 671; 20 Mo., 431; Wilcox vs. Jackson, 13 Pet., 516, 517; Irvine vs Marshal, 20 How, 558; Fenn vs. Holme, 21 How., 481; Lindsey vs. Miller, 6 Pet., 672.)

It follows that the judgment of the supreme court of Missouri must be reversed, and the cause be remanded for further proceedings pursuant to this opinion, and it is so ordered.

D. W. MIDDLETON, *C. S. C. U. S.*

(Endorsed:) Gibson vs. Chouteau. Opinion of Supreme Court U. S. Filed April 22nd, 1872. Francis Minor, clerk, per Jas. F. Baier, d. c.

And afterwards, to wit, at the same term of said court, and on the 29th day of April, 1872, the following further proceedings were had in this cause, to wit:

CHARLES GIBSON, RE'P,
vs.
CHARLES P. CHOUTEAU ET AL., APPELLANTS.

Now again come the parties, by their attorneys, and, after argument herein, the respondent's motion to affirm the judgment rendered
480 herein by the St. Louis land court is submitted to the court; appellant's brief and respondent's brief filed.

And afterwards, to wit, at the same term of said court, and on the 3rd day of May, 1872, the following further proceedings were had in this cause, to wit:

CHARLES GIBSON, RESPONDENT,
vs.
CHARLES P. CHOUTEAU AND JULIA MAFFITT and John Cook, appellants.
Motion to affirm judgment of St. Louis land court.

Now again come the parties aforesaid, and the said respondent, Charles Gibson, having entered of record in this court his remittitur of all damages awarded to him by the judgment of the said St. Louis land court, and also for all the land embraced within United States surveys numbered two thousand nine hundred and seventy-three (2973), in favor of Guion; three thousand three hundred and seven (3307), in favor of Roy; three thousand three hundred and eight (3308), in favor of Tabeau, and three thousand three hundred and nine (3309), in favor of Calve; and the motion of respondent to affirm the judgment of the St. Louis land court being duly submitted to the court, and by it duly considered, the same is sustained.

It is therefore ordered and adjudged that the judgment rendered
481 herein by the said St. Louis land court, except as to the damages and monthly rents and profits, and the land covered by the interfering surveys as aforesaid, be in all things affirmed and stand in full force and effect, and that the said respondent recover of the said appellants his costs and charges herein expended, and have execution therefor.

Opinion filed.

And which said opinion is in words and figures as follows:

In the supreme court Mo., March T., 1872.

CHARLES GIBSON, RESP.,
vs.
CH. P. CHOUTEAU ET AL., APP.
Motion to affirm judgment.

Opinion of the court.

This case was in this court at its Oct. term, 1866, and will be found re-

ported in 39 Mo., 539. We then decided the whole case in favor of the respondent, with one single exception, namely, the statute of limitations. Upon that question we ruled against him, and held that he was barred. On that single point he appealed to the Supreme Court of the United States, and that tribunal has reversed this court, and he now presents his motion, asking that judgment be entered up in his favor.

482 There is obviously nothing more for this court to decide or for any court to retry that is not res adjudicata. Upon every question of State jurisdiction we held for him, and the Supreme Court of the United States has decided the remaining point, coming within Federal cognizance, in his favor, and we therefore think he is entitled to his judgment.

There is a remaining question, however, and that is this: His patent interferes with and covers certain portions of common field lots, which we are satisfied, as now advised, constitute a superior title to his.

A judgment here would be no bar to an action of ejectment in these claims, and we will sustain the motion, on condition that the respondent enters in this court a remittitur for the above-mentioned interferences.

The other judges concur.

DAVID WAGNER.

(Endorsed:) Chas. Gibson vs. Chouteau et al. Opinion of the court. Wagner. Filed May 3rd, 1872. Francis Minor, clerk, per J. F. Baier, d. c. Motion sustained conditionally.

And afterwards, to wit, on the 3rd day of May, 1872, the following remittitur was filed in this cause, to wit:

483 Supreme court of Missouri, April term, 1872.

CHARLES GIBSON, RESPONDENT,
vs.
CHARLES P. CHOUTEAU AND JULIA MOFFITT, appellants.

I hereby accept the affirmance of the judgment below upon the condition stated in the opinion of the court, this day delivered, and enter this my remittitur as to all the land embraced within and covered by the interferences mentioned in the opinion, and for which judgment below was rendered in my favor, and I refer to the opinion as a part hereof.

C. GIBSON.

ST. LOUIS, *May* 3, 1872.

(Endorsed:) Charles Gibson, respondent, vs. Charles P. Chouteau et al., appellants. Remittitur. Filed May 3, 1872. Francis Minor, clerk, per Baier, d. c.

And afterwards, to wit, on the 3rd day of August, 1872, the following fee-bill was issued in this cause, to wit:

CHARLES GIBSON, RESP.,
vs.
CHARLES P. CHOUTEAU ET AL., APPEL'TS. } No March term, 1872.

Clerk Minor	$3 30
Marshal Fuller	30
Resp. Chas. Gibson	207 36
	$210 96
Notice	5 00
	$215 96

484 STATE OF MISSOURI, *ss:*

I, Francis Minor, clerk of the supreme court, held at St. Louis, of the State of Missouri, certify that the foregoing fee-bill is a true copy, in the aggregate, from the fee-book in my office, and that the said appellants are liable for the same.

Witness my hand and the seal of said court, at office, in the city of St. Louis, this 3rd day of August, in the year of our Lord eighteen hundred and twenty-two.

[SEAL OF SUP. C'T OF MO.] FRANCIS MINOR, *Cl'k*,
Per JAS. F. BAIER, *D. C.*

(Endorsed:) No. 74. Oct. T., 1872. Supreme court of Mo. Charles Gibson, resp., vs. Chas. P. Chouteau et al., app'l'ts. Fee-bill. Satisfied Sept. 17, '72. O. S. Fuller.

STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify that the foregoing pages, from page 1 to page 98, both inclusive, of printed matter, and from page 99 to 126, both inclusive, of written matter, contain a full, true, and complete transcript of the record and proceedings of the supreme court of the State of Missouri in the case of Charles Gibson, respondent, vs. Chas. P. Chouteau et al., appellants, as fully as the same appear of record and on file in my office.

485 In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court. Done at office, in the city of Jefferson, this 11th day of October, 1876.

[SEAL OF SUP. C'T OF MO.] HENRY W. EWING,
Cl'k of Sup. C't of Mo.,
By CHAS. G. GUENTHER, *D. C.*

U. S. pat. to Mary McRee. Deed from Mary McRee to C. Gibson, Aug. 8, 1862

Defendant then read the patent issued to Mary McRee, dated June 10, 1862, and the deed from Mary McRee to Charles Gibson, dated 8th August, 1862, in the words and figures following:

(For papers here called for see for patent to Mary McRee pp. , and for deed to Mary McRee to Ch. Gibson see pp. , both inclusive, of this transcript.)

Also deed from John Ruddle to W. T. Mason, and deed from Hester Ruddle and others to Charles Gibson, as follows:

Deed from John Ruddle to W. T. Mason.

Know all men by these presents that I, John Ruddell, of Independence County, State of Arkansas, for and in consideration of one thousand dollars to me paid by William T. Mason, of the city of St. Louis and State of Missouri, the receipt whereof is hereby acknowledged, do hereby convey, remise, release, and forever quitclaim unto the said William T. Mason and his heirs all that tract or parcel of land situate in the county of St. Louis, in the State of Missouri, bounded and described as follows, to wit:

United States survey (No. 2498) two thousand four hundred and
486 ninety-eight, in township forty-five (45) north, of range seven (7) east, in the county of St. Louis, Missouri, as aforesaid, located under New Madrid certificate (No. 150) one hundred and fifty, in the name of James Y. O'Carroll, amounting in the aggregate to the amount of six hundred and forty acres, more or less, with all the privileges and appurtenances thereto belonging, to have and to hold the above-released premises to the said William T. Mason and his heirs, to his and their use and behoof, forever. And I, the said John Ruddell, for myself and my heirs, executors, and administrators, do covenant with the said William T. Mason, his heirs and assigns, that the premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said William T. Mason, his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me, but against none others.

In witness whereof I, the said John Ruddell, have hereunto set my hand and seal this 30th day of May, A. D. 1859.

JOHN RUDDELL. [SEAL.]
MARY RUDDELL. [SEAL.]

Signed, sealed, and delivered in presence of—

487 STATE OF ARKANSAS,
County of Independence:

Be it remembered that on this 30th day of May, A. D. 1859, at the county aforesaid, before me, John A. Price, clerk of the circuit court and ex officio clerk of the county court in and for the county of Independence and State aforesaid, personally came and appeared John Ruddell, grantor in the above deed, to me personally well known, and acknowledged that he voluntarily executed and delivered the foregoing deed for the uses, purposes, and considerations therein expressed, and desired that the same be certified. And also at the same time and place came personally before me Mary Ruddell, wife of said John Ruddell, and of full age, and to me well known, who, being then by me examined in the absence of her said husband, and the contents of the foregoing deed being by me fully explained to her, she declaimed that she had of her own free will executed the same for the purpose therein expressed, without compulsion or undue influence of her said husband, and desired the same to be certified.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, being a court of record, in the town of Batesville, In-
488 dependence county, State of Arkansas, this the 30th day of May, A. D. 1859.

[SEAL.] JOHN A. PRICE, *Clerk.*

STATE OF ARKANSAS,
County of Independence:

I, Nicholas Peed, judge of the county court in and for the county aforesaid, do hereby certify that John A. Price, whose genuine signature appears to the hereunto attached and foregoing certificate of John Ruddell and Mary Ruddell, his wife, is and was at the time of signing the same clerk of the circuit court and ex officio clerk of the county court in and for the county aforesaid, and that his certificate thereto is in due form of law; and I do further certify that the seal of said circuit court is ex officio the seal of the county court of said county, and that said county court is a court of record, and that the said John A. White was duly elected, commissioned, and sworn according to law, and that all his official acts as such are entitled to full faith and credit.

Given under my hand and seal as said judge this the 30th day of May, A. D. 1859.

NICHOLAS PEED, [SEAL.]
Judge of the County Court of Independence County, Arkansas.

STATE OF ARKANSAS,
County of Independence:

489 I, John A. Price, clerk of the circuit court and ex officio clerk of the county court in and for the county aforesaid, do hereby certify that Nicholas Peed, whose genuine signature appears to the foregoing certificate, is and was at the time of signing the same, judge of the county court in and for the county aforesaid, duly commissioned and sworn according to law, and that full faith and credit are due all his official acts, and that his certificate is in due form of law.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in Batesville, this the 31st day of May, A. D. 1859.

[SEAL.] JOHN A. PRICE, *Clerk.*

STATE OF MISSOURI,
County of St. Louis:

I, the undersigned, recorder for said county, certify that the foregoing deed was filed for record in my office June 16, 1859, and is truly recorded in book No. 225, page 123.

Witness my hand and official seal the date aforesaid.

[SEAL.] C. KEMLE, *Recorder.*

Deed of Hester Ruddle et al. to C. Gibson.

We, Hester Ruddle, widow of George Ruddle, and Wilson Hale and Eliza Hale, Joseph and Areney Ruddle, his wife, Ann Ruddle and Angeline Bradshaw, heirs of George Ruddle, in consideration of two
490 hundred and fifty dollars to us paid by Charles Gibson, do hereby quitclaim and convey unto the said Charles Gibson all our right and title and interest in and to a tract of land in the State of Missouri located under and by virtue of a New Madrid certificate, No. one hundred and fifty, and being United States survey No. twenty-four hundred and ninety-eight, to have and to *have and to* hold the same unto him, the said Gibson, and heirs and assigns, forever.

In testimony whereof we hereto set our hands and seals this twenty-eight' day of November, eighteen hundred and fifty-six.

her
HESTER + RUDDLE. [L. S.]
mark.
JOSEPH RUDDLE. [L. S.]
her
ARENEY + RUDDLE. [L. S.]
mark.
ANN + RUDDLE. [L. S.]
ANGELINE BRADSHAW. [L. S.]
W. B. HALE. [L. S.]
ELIZA HALE. [L. S.]

STATE OF MISSOURI,
County of Pemiscot, ss:

Be it remembered that Hester Ruddle, Joseph Ruddle and Areney Ruddle, his wife, Ann Ruddle and Angeline Bradshaw, Wilson B. Hale and Eliza Hale, his wife, who are personally known to me, Sandford Jackson, clerk of the circuit court within and for the county of Pemiscot aforesaid, to be the persons whose names are subscribed to the within deed as parties thereto, this day appeared before me and acknowledged that they
491 executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained; and the said Areney Ruddle having been by me made acquainted with the contents of said deed, and on examination apart from her said husband, and the said Hester Ruddle also having by me been made acquainted with the contents of the said deed, both acknowledged that they executed the said deed and relinquished their dower in the real estate therein mentioned freely and without compulsion or undue influence their said husband'.

In witness whereof I, Sandford Jackson, clerk as aforesaid, have hereunto subscribed my name and affixed the seal of said court, at office, in the town of Gayose, in Pemiscot County aforesaid, this 28th day of November, A. D. 1856.

[SEAL.] SANFORD JACKSON, *Clerk.*

Also deed from John S. Ruddle to Charles Gibson, dated 27 January, 1857; deeds from Elizabeth Ruddle & others to Charles Gibson, dated 22nd January, 1857; from A. Somers to Charles Gibson, dated 8 November, 1856; from Charlotte & al. to Charles Gibson, dated 22 January, 1857; from Thedosia Ruddle & al. to Charles Gibson, dated 8th November, 1856; from Charles Gibson to Mary McRee, dated 15th March, 1862, and from Wm. F. McRee to Charles Gibson, as follows:

492 *Deed fr. Jno. S. Ruddle to Ch. Gibson, dated Jan'y* 27, 1857.

Know all men by these presents that I, John S. Ruddle, heir of George Ruddle, sr., have, for and in consideration of the sum of five dollars to me in hand paid by Charles Gibson, quitclaim, granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Charles Gibson all my right, title, interest, and claim in and to a certain tract or parcel of land situate and being in the State of Missouri, and known and

designated as New Madrid certificate one hundred and fifty and United States survey No. twenty-four hundred and ninety-eight, to have and to hold to him the said Charles Gibson, his heirs and assigns, forever.

In testimony whereof I have hereunto signed my name and affixed my seal this twenty-seventh day of January, eighteen hundred and fifty-seven.

his
JOHN + S. RUDDLE. [SEAL.]
mark.

Sealed, signed, and delivered in presence of—
JOSEPH RUDDELL,
BENJ. STEWART.

STATE OF MISSOURI,
County of Pemiscot, ss:

Be it remembered that John S. Ruddle, who is personally known to me, Sandford Jackson, clerk of the circuit court within and for the county of Pemiscot aforesaid, to be the same person whose name is subscribed
493 to the within deed as a party thereto, this day appeared before me, at the county of Pemiscot aforesaid, and acknowledged that he executed the said deed voluntarily for the uses and purposes therein contained.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the town of Gayose, in Pemiscot County aforesaid, this 31st day of January, A. D. 1857.

[SEAL.] SANDFORD JACKSON,
Clerk Circ't C't Pemiscot Co., Mo.

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, receiver in and for said county, certify that the foregoing instrument of writing was filed for record in my office February 12th, 1857, and is truly recorded in book 184, page 310.

Witness my hand and official seal the date aforesaid.

C. KEMLE, *Recorder.*

Deed of Eliza Ruddle & al. to C. Gibson, dated Jan'y 22nd, 1857.

We, Elizabeth Ruddle (widow), George Ruddle, John S. Ruddle, Stephen Ruddle, Elizabeth Ruddle, and John Alexander, and Mary Jane; his wife, formerly Mary Jane Ruddle, widow and heirs of Cornelius Ruddle, deceased, who was a son and heir of George Ruddle, senior, late of Lawrence County, Arkansas, in consideration of five dollars to us paid by Charles Gibson, do hereby quitclaim and convey unto the said Charles
494 Gibson all our right, title, and interest in and to a tract of land in the State of Missouri, in township No. , range No. , located under and by virtue of a New Madrid certificate, No. one hundred and fifty, and being United States survey No. twenty-four hundred and ninety-eight, to have and to hold unto him, the said Charles Gibson, and his heirs and assigns forever.

In witness whereof we have hereunto set our hands and seals this twenty-second day of January, 1857.

her
ELIZABETH + RUDDLE, SR. [SEAL.]
mark.
her
ELIZABETH + RUDDLE, JR. [SEAL.]
mark.
his
STEPHEN + RUDDLE. [SEAL.]
mark.
GEORGE RUDDLE. [SEAL.]

Signed, sealed, and delivered in presence of—
RICHARD H. HATCHER,
BENJ. STEWART.

STATE OF MISSOURI,
County of New Madrid, ss:

Be it remembered that Elizabeth Ruddle (widow), Elizabeth Ruddle, junior, Stephen Ruddle, and George Ruddle, who are personally known to me, Richard H. Hatcher, clerk of the circuit court in and for said county of New Madrid, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared before me and *and* acknowledged that they executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained.

495 Witness my hand and the seal of said court hereto affixed, at office, in the town of New Madrid, this 22nd day of January, A. D. 1857.

[SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder for said court, certify that the foregoing instrument of writing was filed for record in my office Jan'y 27, 1857, and is truly recorded in book No. 183, page 477.

Witness my hand and official seal the date aforesaid.

[SEAL.] C. KEEMLE, *Recorder.*

Deed fr. A. Summers to C. Gibson, dated Nov. 28, 1856.

We, Alexander Summers and Susan Summers, his wife, heirs of George Ruddle, in consideration of two hundred and fifty dollars to us paid by Charles Gibson, do hereby quitclaim and convey unto him, said Gibson, all our right, title, and interest in and to a tract of land in the State of Missouri located under and by virtue of a New Madrid certificate, No. one hundred and fifty, and being United States survey No. twenty-four hundred and ninety-eight, to have and to hold the same unto him, said Gibson, his heirs and assigns, forever.

In testimony whereof we hereto set our hands and seals this
496 twenty-eight' day of November, eighteen hundred and fifty-six.

A. SUMMERS. [L. S.]
her
SUSAN + SUMMERS. [L. S.]
mark.

STATE OF MISSOURI,
County of Pemiscot, ss:

Be it remembered that Alexander Summers and Susan Summers, his wife, who are personally known to me, Sandford Jackson, clerk of the circuit court within and for the county of Pemiscot aforesaid, to be the persons whose names are subscribed to the deed as parties thereto, this day personally appeared before me and acknowledged that they executed and delivered the same for the uses and purposes therein contained; and the said Susan Summers having been by me made acquainted with the contents of said deed, and on examination apart from her said husband, acknowledged that she executed the said deed and relinquished her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the town of Gayoso, in Pemiscot County aforesaid, this 28th day of November, A. D. 1856.

[SEAL.] SANDFORD JACKSON,
Clerk Circuit C't of Pemiscot Co., Mo.

497 STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder in and for said county, do hereby certify that the foregoing instrument of writing was filed for record in my office January 27th, 1857, and is truly recorded in book No. 180, p. 453.

Witness my hand and official seal the day and year aforesaid.

[SEAL.] C. KEMLE, *Recorder.*

Deed of Charlotte Triart et al. to Ch. Gibson, dated Jan. 22nd, 1857.

We, Charlotte alias Lottey Friart, formerly Summers, Elizabeth Williams, formerly Summers, Isabel Dumay, formerly Summers, Rebecca Reams, formerly Summers, and Emily Summers, widow of William Summers, dec'd, S. W. Summers and I. B. Summers, Melinda C. Summers and Andrew B. Summers, and W. W. Summers, Daniel B. Russell, and Amelia H. Russell, his wife, formerly Summers, heirs and legal representaves of Sally Summers, formerly Sally Ruddle, dec'd, who was the daughter of George Ruddle, senior, late of Lawrence County, Arkansas, in consideration of twenty dollars to us paid by Charles Gibson, do hereby quitclaim and convey unto the said Charles Gibson all our right, and title, and interest in and to a tract of land in the State of Missouri, in township No. , range No. , located under and by virtue of a New Madrid certificate, No. one hundred and fifty, and being United States survey No. twenty-four
498 hundred and ninety-eight, to have and to hold the same unto him, the said Charles Gibson, and his heirs and assigns, forever.

In witness whereof we have hereunto set our hands and seals this twenty-second day of January, 1857.

CHARLOTTE TERART.	[SEAL.]
W. W. SUMMERS.	[SEAL.]
G. W. SUMMERS.	[SEAL.]
J. R. SUMMERS.	[SEAL.]
EMILY SUMMERS.	[SEAL.]
her REBECCA + REAMS. mark.	[SEAL.]
DANIEL B. RUSSELL.	[SEAL.]
MELINDA C. SUMMERS.	[SEAL.]
ANDREW B. SUMMERS.	[SEAL.]
her ELIZABETH + WILLIAMS. mark.	[SEAL.]
ISABELLA + DUMAY.	[SEAL.]
AMELIA H. RUSSELL.	[SEAL.]

Signed, sealed, and delivered in presence of—
RICH'D H. HATCHER.
BENJ. STEWART.

STATE OF MISSOURI,
County of New Madrid, ss:

Be it remembered that Charlotte Terart, Elizabeth Williams, Isabella Dumay, William W. Summers, George W. Summers, John R. Summers, Emily Summers, Rebecca Reams, Daniel B. Russell and Amelia Russell, his wife, Malinda C. Summers, and Andrew B. Summers, who are personally known to me, Richard H. Hatcher, clerk of the circuit court in and for said county of New Madrid, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared
499 before me and acknowledged the same as their voluntary act and deed for the uses and purposes therein contained; and said Amelia Russell being by me made acquainted with the contents of said deed, acknowledged on an examination apart from her husband that she executed the same freely and with compulsion or undue influence of her husband.

Witness my hand and the seal of said court hereto affixed, at office, in the town of New Madrid, this 22nd day of January, A. D. 1857.

[SEAL.] RICH'D H. HATCHER, *Clerk.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder for said county, certify that the foregoing instrument of writing was filed for record in my office January 27, 1857, & is truly recorded in book 182, 375.

Witness my hand and official seal the date aforesaid.

[SEAL.] C. KEEMLE, *Recorder.*

Deed of Theodoria Ruddle et al. to C. Gibson, dated Nov. 28th, 1856.

We, Theodoria, alias Hector Ruddle, widow of George Ruddle, Wil-

son B. Hale and Eliza Hale, Joseph Ruddle and Arrena Ruddle, his wife, Ann Ruddle, and Angeline Bradshaw, heirs of said George Ruddle, in consideration of two hundred & fifty dollars to us paid by
500 Charles Gibson, do hereby quitclaim and convey unto him, said Gibson, all our right, and title, and interest in and to a tract of land in the State of Missouri located under and by virtue of New Madrid certificate No. one hundred and fifty, being United States survey No. twenty-four hundred and ninety-eight, to have and to hold the same unto him, said Gibson, and his heirs and assigns, forever.

In testimony whereof we hereto set our hands and seals this twenty-eight' day of November, eighteen hundred and fifty-six.

her
HESTER + RUDDLE. [L. S.]
mark.
W. B. HALE. [L. S.]
ELIZA HALE. [L. S.]
JOSEPH RUDDLE. [L. S.]
her
ARRENA + RUDDLE. [L. S.]
mark.
her
ANN + RUDDLE. [L. S.]
mark.
ANGALINE BRADSHAW. [L. S.]

STATE OF MISSOURI,
County of Pemiscot, ss:

Be it remembered that Hester Ruddle, and W. B. Hale and Eliza Hale, his wife, Joseph Ruddle and Arrena Ruddle, his wife, Ann Ruddle, and Angeline Bradshaw, who are personally known to me, Sandford Jackson, clerk of the circuit court within and for the county of Pemiscot aforesaid, to be the persons whose names are subscribed to the
501 within deed as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained; and the said Arrena Ruddle having been by me made acquainted with contents of said deed, and on examination apart from her said husband, and the said Hester Ruddle also having been by me made acquainted with the contents of said deed, both acknowledged that they executed the said deed and relinquished their dower in the real estate therein mention freely, voluntarily, and without compulsion or undue influence of their husband'.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the town of Gayoso, in Pemiscot County aforesaid, this 28th day of November, A. D. 1856.

SANDFORD JACKSON,
Clerk Circ't C't Pemiscot Co., Mo.

STATE OF MISSOURI,
County of St. Louis, ss:

The undersigned, recorder in and for said county, do hereby certify that the foregoing instrument of writing was filed for record in my office December 6th, 1856, and is truly recorded in book No. 180, fo. 269.

Witness my hand and official seal the day and year aforesaid.

[SEAL.] C. KEMLE, *Recorder.*

502 *Deed fr. C. Gibson to Mary McRee, dated Mar.* 15, 1862.

In consideration of one dollar to me, Charles Gibson, paid by Mrs. Mary McRee, of St. Louis, I hereby convey to her all my right & title to a tract of land in St. Louis County, Missouri, being United States private survey No. twenty-four hundred and ninety-eight, under New Madrid certificate of James Y. O'Carroll, or his legal representatives, and numbered one hundred and fifty, to have and hold the same unto her, said Mrs. McRee, and her representatives forever.

In testimony whereof I hereto set my hand and seal this fifteenth day of March, eighteen hundred and sixty-two.

C. GIBSON. [SEAL.]

WASHINGTON,
District of Columbia:

Be it remembered that on this nineteenth day of March, 1862, Charles Gibson, who is personally known to the undersigned to be the same person who executed the above instrument of writing, personally appeared before the undersigned and acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I hereto set my hand and affix my notarial seal the day aforesaid.

[SEAL.] JAS. H. McKENNEY,
Notary Public, W. C., D. C.

503 To the above deed is annexed the following certificate:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
January 17th, 1874.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications of papers on file in this office in the case of Mary McRee, assignee of James Y. O'Carroll, New Madrid certificate No. 150.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL OF GEN'L LAND OFFICE.] WILLIS DRUMMOND,
Commissioner of General Land Office.

(On margin:) Deed fr. W. F. McRee to Ch. Gibson.

504 The defendant, Charles Gibson, then put in evidence certified copies of the following papers from the General Land Office, that is to say: Copy deed of S. MacRee to Chouteau; also Williams' abstract of Mr. Chouteau's title—both with certificate of Com'r of Gen. Land Office; also letter of Com'r Gen. Land Office to Sur. Gen. Cuddy. He also put in evidence a copy of a letter from the Comm'r of the General Land Office to Charles Gibson, dated 8' March, 1862, as follows:

(On margin:) Deed of S. McRee to Chouteau.

Deed of S. McRee to Chouteau.

This deed was made this thirteenth day of August, in the year eighteen hundred and thirty-eight, witnesseth:

That Samuel McRee, of the Army of the United States, and Mary McRee, his wife, for and in consideration of one hundred and fifty dollars to them in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, released, quitclaimed, and conveyed, and by these presents do bargain, sell, release, quitclaim, and convey, unto Pierre Chouteau, junior, of the city of St. Louis, and his heirs, the following-described tract or parcel of land, situate, lying, and being in the county of St. Louis and State of Missouri, bounded as follows, to wit: Beginning on the eastern line of the league square granted and confirmed to Charles Gratiot at a point where the southern line of the land confirmed to Susan Du-
505 buil intersects the said line of the said league square, south eighty degrees forty minutes west forty-eight chains, to a point in said line corner of Susan Jeannette claim; thence south eighty-three degrees thirty minutes east thirteen chains sixty-four links, to a post; thence north eight degrees forty minutes east forty-five chains ninety-seven links, to a post; thence north seventy-five degrees west thirteen chains seventy links, to the beginning, containing the quantity of sixty-four acres, being a part of the tract located under a New Madrid certificate issued to James Y. O'Carroll, or his legal representatives, to be taken off the western end of said tract, and in the same parcel of land *land* conveyed to said Pierre Chouteau, junior, by Robert Wash, as trustee of Joseph Hertzog, by deed recorded in the recorder's office of St. Louis County, in book M, pages one hundred and twenty-two and following, to have and to hold the above-described tract of land to the said Pierre Chouteau, junior, and his heirs, forever.

In testimony whereof the said Samuel McRee and wife have hereto set their hands and seals the day before written.

SAM'L McREE. [SEAL.]
MARY McREE. [SEAL.]

506 STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on the thirty-first day of October, in the year of our Lord eighteen hundred and thirty-nine, before me, a justice of the peace within and for the county aforesaid, appeared Samuel MacRee and Mary, his wife, who are both personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and severally acknowledged the same to be their act and deed for the purposes therein mentioned. She, the said Mary, being made acquainted with the contents of said conveyance, acknowledged on an examination apart from her husband that she executed the same and relinquished her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband. Taken and certified the day and year last aforesaid.

P. WALSH, *Justice.*

Filed for record November 8th, 1839, and recorded November 11th, 1839.

JOHN RULAND, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss :

I, the undersigned recorder within and for the county aforesaid,
507 certify the foregoing to be a true copy of an instrument of writing executed by Sam'l McRee and wife, and also of the certificates of acknowledgment and date of filing and recording thereof, as fully as the same remains of record in my office in book K No. 2, page 112.

In testimony whereof I hereunto set my hand and affix my official seal, at office, in St. Louis, this 25th Nov., 1850.

[L. S.] S. D. BARLOW, *Recorder.*

Williams' abst. of Chouteau's title.

I have examined the title to a tract of land described in a deed from Maj. Samuel McRee and wife to Pierre Chouteau, junior, recorded in book K No. 2, page 112, containing 64 acres, part of a New Madrid location, in the name of James Y. O'Carroll, certificate No. 150, survey No. 2498, township 45 north, range 7 east. The transfers of the land at New Madrid, in lieu of which this location was made, do not appear of record in this county. The first conveyance I find of record here is from James Tanner to Christian Wilt. The conveyances under which Tanner claims from O'Carroll appears to have been recorded in New Madrid County, as I find in the United States recorder's office a certificate signed by Richard H. Waters, clerk, in which he certifies that the settlement claim of James Young O'Carroll has been transferred by the said O'Carroll to
508 George Ruddell, and 550 arpens of said tract has been transferred by said Ruddell to James Tanner and Andrew P. Gillaspie, and the interest of said Gillaspie to said claim has been transferred by said Gillaspie to James Tanner, and 200 arpens of the original claim of James Y. O'Carroll has been transferred by George Ruddell to George Damron, and the legal heirs and repr's of George Damron, deceased, to James Tanner. This certificate is dated Oct. 18, 1816, and shows the following claims of title as of record in New Madrid County :

American State Papers, title Public Lands," vol. 2, page 295 : Confirmation to James Y. O'Carroll. Certificate No. 1040. Issued June 20th, 1811, in favor of James Y. O'Carroll. Settlement right on Mississippi, 640 acres, 350 arpens, in New Madrid district.

James Y. O'Carroll to George Ruddell.

George Ruddell to James Tanner and Andrew Gillaspie, 550 arpens of of said tract.

Andrew Gillaspie to James Tanner.

509 George Ruddell to George Damron, 200 arpens.

George Damron's resp. to James Tanner.

Recorder Bates, having the certificate of Waters above referred to before him, as appears by the memoranda on the same in his handwriting, issued the certificate No. 150 in name of Carroll for 640 acres, which certificate was dated Nov. 30, 1815, and was delivered to Tanner. It is now on file in the surveyor-general's office.

LOCATION.

Christian Wilt, for James Y. O'Carroll or his legal representatives, enters 640 acres of land, in virtue of a certificate No. 150, dated Nov. 30th, 1815, and issued by Frederick Bates, esq., recorder of land titles for Missouri Territory:

Beginning at the northwestwardly corner of what is commonly called and known by the name of the Prairie or Barrière des Noyers tract or surveys of land, which said tract includes a number of surveys or parcels of land claimed by divers individuals, running from said point of beginning north 83½° east, with the northerly boundary line of the said De
510 Noyer tract, 320 poles; thence and from the beginning N. 61½° W., at right angles, for the quantity of 640 acres.

CHRISTIAN WILT.

WM. RECTOR, Esq.,
Surveyor, &c.

Nov. 8, 1816.

Class 35.

See letter of Commissioner of General Land Office, March 19, 1847, in relation to sundry interferences with this location, also plat of surveys so interfering, all in the surveyor-general's office.

Book H, page 237: James Tanner to Christian Wilt, 31, 1816. Consid., $1,280. In fee conveys 640 acres of land, with privilege of locating the same according to act of Congress of February 17, 1815, said 640 acres originally of James Y. O'Carroll, and conveyed by regular chain of title to Tanner, who has accepted the relief, &c., under act of Congress, and obtained certificate No. 150; empowers Wilt to locate, &c., &c.

(Signed) JAMES TANNER. [SEAL.]

Acknowledged at date of the instrument.

M. P. LEDUC,
Clerk Cir. C't.

Recorded March 25, 1818.

Wilt died without having conveyed.

Book K, 316: Charles S. Hempstead, guardian of George Wilson Wilt, infant son, and only heir of Christian Wilt, to Joseph Hertzog, surviving partner of the late firm of Christian Wilt, Sept. 10, 1821, recites that Hertzog filed bill in St. Louis cir. co., sitting as court of chancery, to cause to be conveyed to him, as said surviving partner, by Hempstead,
511 guardian, &c., certain real estate purchased for an' on % of the firm by Christian Wilt; that the cir. court at August term ordered that the land hereinafter described should be transferred and assigned by said guardian to said Hertzog. Therefore said guardian assigns and conveys to said Hertzog, among other property, the 640 acres grant to Carroll, the land in question, said land to be sold only for the benefit of said firm, according to the order of the court.

CHARLES S. HEMPSTEAD, [SEAL.]
Guardian of G. W. Wilt.
ARCHIBALD GAMBLE, *Clerk Cir. C't.*

Recorded Sept. 13, 1821; acknowledged Sept. 13, 1821.

Book L, page 191: Joseph Hertzog to Robert Wash, trustee of Louis Devotion. Deed of trust, Oct. 26, 1822. Recites indebtedness of Hertzog to Devotion to am't of $9,549, or as balance due on judgment obtained by Devotion against Hertzog in St. Louis cir. court conveys sundry tracts, among which (3d description) the 640 acres in question, N. M. location, Jas. Y. O'Carroll certif. No. 150. If Hertzog pays $1,000, with 10 p'r c't int. from this date, by 1st March, 1823—

⅓ of balance	"	"	"	1st Nov., 1823,
⅓ " "	"	"	"	1st Nov., 1824,
⅓ " "	"	"	"	1st Nov., 1825,

then this deed to be void. If he fails to pay, Wash is to sell at public sale, 10 days' notice, for cash.

JOSEPH HERTZOG. [SEAL.]
R. WASH. [SEAL.]

JNO. K. WALKER.
R. WASH.

512 On 18th Nov., 1822, Judge Wash undertakes to prove the execution of the above by his own testimony as subscribing witness, before Arch'd Gamble, clerk cir. court. Recorded Nov. 18, 1822.

Book Q, page 512. Joseph Hertzog to Robert Wash, trustee of Louis Devotion. Same deed as the above, L. 191, again recorded, with an additional certificate. Proof of execution by Hertzog and Wash as parties to said deed made by John K. Walker, a subscribing witness, on 28th Jan., 1831, before Joseph C. Brown, clerk of the supreme court for third judicial district of Missouri. Recorded February 21, 1831.

Book W, page 172: Robert Wash, trustee of Joseph Hertzog, to Peter Chouteau, jun'r. In virtue of a deed dated Oct. 26, 1822, and in consid. of $128, sells and conveys to Chouteau in fee all the right, title, interest, &c., which Jos. Hertzog had at the date of said deed in and to 64 acres of the 640 in question, said 64 acres to be taken off the western side of said location and tract of 640 acres adjoining the league square confirmed to late Charles Gratiot, deceased, the line to commence where the southwestermost line of Susannah Dubreuil's confirmation of 80 arpens,
513 No. 833, intersects the east line of said league square, and to run southwardly with the last-mentioned line to the line of the Barrière des Noyer fields, and thence eastwardly and northwardly, for quantity to be surveyed as near in a square as may be from said described boundaries, as may appear by reference to the plat of township No. 45 aforesaid in said surveyor's office.

(Signed) R. WASH. [SEAL.]

Acknowledged Nov. 30th, 1824.

P. WALSH, *J. P.*

Recorded Dec'r 13, 1824.

The tract in question passes or is claimed by another chain of title, as follows:

Book M, page 303: Joseph Hertzog, by sheriff to Henry Clay, executor of will of James Morrison, dec'd. Sheriff's deed, May 17, 1825, recites that execution issued from the circuit court of St. Louis County, returnable to February term of said court in 1825, in favor of Henry Clay, executor of James Morrison, deceased, against Joseph Hertzog (copy of execution; amount of judgment, $2,286; damages, $147.45, and costs). By virtue of which execution, on 1st January, 1825, levied upon all the right, title, interest, estate, and property of said Joseph in and to sundry lots and tracts, among which the land in question (4th description), and having advertized, &c. (copy of advertisement on 31st March, 1825), sold
514 said tract for $450 to Henry Clay, ex'r of James Morrison, deceased, which sum being paid the said sheriff makes deed, &c.
(Signed) JOHN K. WALKER, *Sh'ff.* [SEAL.]

Ack. in open court May 17, 1825. Archibald Gamble, clerk, (does not say of what court). Recorded June 7, 1825.

Book M No. 2, page 260: Henry Clay & wife to Ann McRee, James F. McRee, and Samuel McRee, heirs and legal reps. of William McRee, deceased. Quitclaim Oct. 11, 1839. Bargain, sell, & convey all that certain tract or parcel of land, containing 640 acres, &c., New Madrid location No. 150, being the same tract of land acquired by said Henry Clay at sheriff's sale as the property of Joseph Hertzog, as will appear by deed dated May 17, 1825, recorded June 7, 1825, to have and to hold to said parties of the second part, as heirs-at-law of the said William McRee, deceased, in the shares and proportions in which they are entitled by law to the estate of said deceased in the State of Missouri, and to their heirs forever. Warranty against claims under him, but no other.
(Signed) H. CLAY. [SEAL.]
LUCRETIA CLAY. [SEAL.]

Acknowledged Oct. 11, 1839.

J. C. RODES,
Clerk Co. Court, Fayette Co., Ky.

Recorded June 2, 1840.
515 In the above deed there is no mention made of Morrison or that Mr. Clay sells as his executor. The only reference showing in what capacity Mr. Clay acts is to the deed by sheriff to him as the property of Hertzog. Aside from this the above deed contains nothing to show that Mr. Clay conveyed or designed to convey as executor.

Book Y, 491: Ann McRee, James F. McRee, and his wife, Mary A. McRee, heirs of William McRee, to Samuel McRee. In fee, special warranty against claims under them, July 4, 1836. Recites that William McRee, late of Missouri, died intestate, seized and possessed of one or more tracts or parcels of land in the State of Missouri. And whereas said Ann, as the mother, and James F., as one of the brothers of said William, are, by the laws of the State of Missouri two of the heirs-at-law of said William and as such are each entitled to one undivided one-third part of the lands of which he died seized: Therefore said Ann, James F., and Mary A., wife of said James F., in consideration of $1,600 to them paid, grant, bargain, sell, alien, &c., to said Samuel McRee, his heirs, all the real estate

situate in the State of Missouri of which the said Wm. McRee died
516 seized and possessed as aforesaid, and more particularly a tract of land situate, lying, and being near the town of St. Louis, bordering on the commons of said town, in the State of Missouri, said to contain 700 arpens, more or less, hereby remising and releasing all and whatsoever right, title, interest, and property, claim, or demand which the said Ann McRee and James F. McRee, or either of them, have or may have of, in, and to said land as heirs-at-law aforesaid.

ANN McREE. [SEAL.]
MARY McREE. [SEAL.]
JAMES F. McREE. [SEAL.]

Acknowledged July 12, 1836.

WM. A. WRIGHT,
Clerk of the Superior Court of Law
for County of New Hanover, North Carolina.

Recorded Nov. 29, 1836.

Book K 2, page 112: Samuel McRee and wife to Pierre Chouteau, junior. Quitclaim in fee Aug. 30, 1838. Consideration, $150. Conveys a tract of land beginning on the eastern line of the league square granted and confirmed to Charles Gratiot, at a point where the southern line of the land confirmed to Susan Dubreuil intersects the said line of the league square; thence with the line of said league square south 8° 40′
517 west, 48 chains to a point in 2 (torn) line corner of Susan Jeannette's claim; thence 83° 30′ east 13 chains 64 links, to a post; thence north, 8° 40′ east, 45 chains 97 links to a post; thence north 75° west 13 chains 70 links, to beginning, containing 64 acres, part of New Madrid location under James Y. O'Carroll, to be taken off the western end of said tract, and is the same parcel of land conveyed to said Pierre Chouteau by R. Wash, as trustee of Joseph Hertzog, by deed recorded in the recorder's office, book M, page 172 and following.

SAMUEL McREE. [SEAL.]
MARY McREE. [SEAL.]

Ack. Oct. 31, 1839.

P. WALSH, *J. P.*

Recorded Nov. 8, 1839.

I have not examined to ascertain if Mr. Chouteau ever conveyed.
St. Louis, May 7, 1851.

HENRY W. WILLIAMS.

(Annexed to the copy from which the two papers immediately preceding are transcribed is the following certificate:)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
January 12th, 1874.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications of certain papers filed in this office with the papers in the claim of Mary McRee, assignee of James Y. O'Carroll, New Madrid, certificate No. 150.

In testimony whereof I have hereunto subscribed my name, and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

{SEAL OF GEN'L LAND OFFICE.} WILLIS DRUMMOND,
Commissioner of General Land Office.

Letter fr. Com'r G. L. Off. to Surv. Gen'l Cuddy.

(This letter is erroneously inserted on page 521, to which page refer.)

He also put in evidence a copy of a letter from the Commissioner of the General Land Office to Charles Gibson, dated 8' March, 1862, as follows:

Letter of Com'r G. L. Off. to Gibson, Mar. 8, '62.

SIR: On the 27th ult. I had the honor to receive your communication of 211st, asking, as counsel for Mary McRee, that a patent be issued to her, as assignee of James Y. O'Carroll, on New Madrid certificate No. 447, in virtue of the reissue conveyances from said O'Carroll. The case has been duly examined, and it is found that the plat of survey which was sent here with patent certificate No. 447, in 1841, by Wm. Milburn, does not conform to the survey represented on the official township plat, approved in 1845 by Surveyor-General Conway, nor does it show the conflicting claims.

A communication has therefore been addressed to the surveyor-general, to the end that a proper plat of survey, exhibiting valid interferences, may be furnished, with a new patent certificate, and upon its receipt here the case will receive the further attention of this office, in view of your application for a patent.

In respect to the issue of the patent to the assignee, it is proper to state that the opinion of Attorney-General Wirt, dated May 11, 1820, did not recognize an assignable quality in New Madrid grants. When the proper returns of survey, with patent certificate, shall have been received, however, this question will be particularly considered, in view of the changed circumstances of the present case from that in which the opinion was rendered, and the head of the Department will be consulted for our government in the premises. In the mean time, as orally stated some days ago, there are important papers wanting, which are named in your list accompanying the application, viz:

1st, No. 16½, William T. Mason to Mary McRee;

2d " 23, Charles Gibson and wife to Mary McRee; besides

3rd, proof that Rachael Damron & others mentioned in No. 6 of your list are the legal heirs and representatives of George Damron, deceased, who held 200 arpens of the O'Carroll claim under deed from G. Ruddle, No. 4 of list.

It is suggested that these omissions should be supplied in time, so that the whole matter may be disposed of when the requisite returns hereinbefore mentioned shall have been received.

With great respect, your ob't ser't,

J. M. EDMUNDS,
Commissioner.

Hon. C. GIBSON,
Solicitor Court of Claims, Present.

Also a letter from Montgomery Blair to Charles Gibson, dated 20th June, 1862, as follows:

Letter of M. Blair to C. Gibson, June 20, '62.

CHARLES GIBSON, Esq.:

DEAR CHARLEY: I have just mailed the patent to Mrs. McRee to Nelson, the recorder at St. Louis, who will deliver it to you of course.

Y'rs, truly,

M. BLAIR.

WASH'N, *June* 20, '62.

(To the reading of this letter in evidence plaintiff objected that the same was incompetent and irrelevant.

The court overruled the objection, and plaintiffs excepted thereto at the time.)

Defendant Gibson then read instructions from the Commissioner of the General Land Office to the recorder of land titles at St. Louis, dated 19 March, 1847, as follows: (See page of this transcript.)

Letter of General Land Office to W. Cuddy, called for on page 518 *of this transcript.*

GENERAL LAND OFFICE,

521 *March 8th*, 1862.

SIR: Application has been made to this office by C. Gibson, esq., as counsel for Mary McRee, for the issue of a patent to her as assignee, in right of James Y. O'Carroll, on the New Madrid location made by location certificate No. 447, which has been designated as survey No. 2498, in township 45 north of range 7 east, and he has filed conveyances to show transfer of the O'Carroll interest to Mrs. McRee. Upon examination there is found on our files patent certificate No. 447, dated 16' August, 1841, in favor of James Y. O'Carroll or his legal representatives, accompanied by a transcript plat of the O'Carroll survey as executed in 1818 by Jas. C. Brown, D. S., said transcript having been certified 10th August, 1841, by Silas Reed, then surveyor-general.

This survey for O'Carroll, I find, differs from that laid down on the official township plat in this office, certified under date of January 31, 1845; and, further, that in view of certain conflicts the case was the subject of instructions from this office to the surveyor-general of August 28, 1841, is considered in the letter of Surveyor-General Conway of 30th July, 1845, and in the further instructions to the surveyor-general of the 19th of March, 1847.

In the aforesaid instructions of 19th March, 1847, it is stated as follows:

One of the claims interfering with Cottard (survey No. 3183) is O'Carroll New Madrid claim, L. C. No. 150. All that portion of O'Carroll's location east of the St. Louis common line will yield 1st to the common claims.

522 Besides this interference with O'Carroll, N. M. 150, are the following:

2nd, survey No. 2973; 3rd, survey No. 3307; 4th, survey No. 3308,

according to s. gen'l's letter A, of 30th July, 1845; the 2nd, 3d, and 4th were proved before recorder in 1825.

5th, survey No. 3309 not confirmed. O'Carroll is also interfered with by, 6th, survey No. 3182, decision No. 328 of the late board. If on examination it should satisfactorily appear to you that the lands embraced by said surveys were at the date of O'Carroll's location lands reserved for said claims, the O'Carroll location must yield to them, because such land is interdicted under the New Madrid act of 17th Feb'y, 1815; but if at the time of location either of the tracts was not reserved, but such lands as was authorized by the N. Madrid act to be located, the New Madrid claim No. 150 will, of course, hold valid against either tract in this category.

The facts on this point can best be determined by the s. general from the records of this office, aided by those of the recorder.

If there should be no valid claim to any portion of the residue of the O'Carroll claim, and such residue was such land as was allowed by the New Madrid act of 17th Feb'y, 1815, to be located on the return here of a proper plat and patent certificate for said residue, a patent will issue.

523 Now, the object of this communication is to instruct you to make a careful examination of the O'Carroll survey and the interferences therewith.

You will then prepare a new and correct particular plat of the survey of said claim, showing the extent and area of each interference, designating such as should hold against it, and certifying that the residue is such land as by the New Madrid act of the 17th Feb'y, 1815, is legally appropriateable to the said New Madrid location. You will then hand it over to the recorder, that he may record the same and send it on with a new certificate and the old cert., No. 447, which, with the old transcript of survey, No. 3189, I enclose herewith merely for convenience, that you may see where it does not conform to O'Carroll's survey, as recognized and laid down on the township plat of 1845.

Your early and careful attention is requested, that the patent may speedily issue.

Very respectfully, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

WM. CUDDY, Esq.,
Surveyor-General, St. Louis, Mo.

524 He then read (the plaintiff objecting and excepting thereto at the time as incompetent and irrelevant) a receipt from the clerk of the Supreme Court of the U. S. for costs, in the words and figures following:

1830——13

Rec't for costs fr. cl'k U. S. Sup. C't.

Supreme Court of the United States, December term, 1868, No. 102.

[U. S. stamp, 2 cts.]

Charles Gibson, J. D. McPherson, to D. W. Middleton, clerk of Sup. C't U. S., Dr.

For your cost on a writ of error to the supreme court of the State of Missouri taken by you against Chas. P. Couteau & al.. $112 64.
Fee-book K 63.
Test: D. W. MIDDLETON,
C. S. C't U. S.

1869, 11th June, received payment, per J. D. McPherson, by
D. W. MIDDLETON,
C. S. C. U. S.

He then read (the plaintiffs objecting and excepting thereto at the time as incompetent and irrelevant) a letter from F. A. Dick to Charles Gibson, dated November 23d, 18 , as follows:

Letter fr. F. A. Dick to C. Gibson, dated Oct. 23, 1876.

ST. LOUIS, *Oct.* 23, 1876.

CHARLES GIBSON, Esq.:

DEAR SIR: In the case of Gibson (Charles) vs. Chouteau in the Supreme Court of the United States, reported Wallace, you paid to Blair and Dick a fee of two thousand dollars for their services. According to my best recollection, you were present at both hearings of the case, and the case was fully argued as to the equitable & legal title both. My recollection of this last point is very clear for the great weight of my own individual argument was to convince the court that upon equitable prin-
525 ciples & considerations the case should be given to you, & therefore I went into an elaborate explanation of the case in that aspect, & my feelings at the time was that that part of my argument was the most effective & necessary.

Your ob't se't,

F. A. DICK.

He then read (subject to the same objection and exception) a receipt from J. R. Lackland, as follows:

Rec't fr. J. R. Lackland to C. Gibson.

Rec'd of C. Gibson two hundred dollars on % Chouteau case.
J. R. LACKLAND.

DEC. 4, 1872.

He then read in evidence copy of deed from George Ruddle to George Dameron, dated Nov. 1. 1875, already read by plaintiffs, also the depositions of Wm. G. McRee, of Robert Corcoran, and Mary McRee, as follows:

For copy of deed fr. Geo. Ruddle to Geo. Dameron, Nov. 1, 1815, see p. 157, seq. of this transcript.

(On the margin:) Ref. to p. 157, this tr.

For copy of depositions of Rob't Corcoran, Wm. G. McRee, & Mary McRee see pp. 422 to 431, consecutively, & inclusive of this transcript.

(On the margin:) Ref. to pp. 422–431, this tr.

Also copy of letter from himself to Jno. R. Shepley, dated 2d April, 1857, as follows:

For copy of said letter see page 431 of this transcript.

(On the margin:) Ref. p. 431, this tr.

(To the reading of this letter plaintiffs objected that the same was incompetent and irrelevant. The court overruled the objection and the plaintiffs excepted at the time thereto.)

He also read a copy of a letter from himself to Charles P. Chouteau, dated November 30, 1858, as follows: (See page 433 of this transcript).

(On the margin:) Ref. to p. 433, this tr.

(To the reading of this letter plaintiffs objected that the same was incompetent and irrelevant. The court overruled the objection and plaintiff excepted thereto at the *the* time.)

He then read the opinion of the supreme court of Missouri in Berthold v. McDonald (24 mo. 126), as follows:

526 Both parties consenting to the substitution of the printed volume for manuscript copy.

(To the reading in evidence of this opinion, plaintiffs objected that the same was incompetent and irrelevant. The court overruled the objection and plaintiffs excepted thereto at the time.)

He then read copy of deeds from George Ruddle to Wm. Rogers, dated 23d February, 1811, & from Wm. Rogers to John Ruddle, date 18' August, 1817, as follows:

Deed fr. Geo. Ruddle to William Rogers.

This indent*er*, made and entered into this 20-third day of February, one thousand eight hundred and eleven, by and between William Rogers of the one part, & George Ruddell of the other part, both of the district of New Madrid and Territory of Louisiana and township of the Little Perare, witnesseth, that for and in consideration of the sum of four hundred dollars to me in hand paid by the said William Rogers, a rece'pt for the same is by me acknowledged, I have bargained and sold unto him two hundred arpents of land, situated in the district aforesaid, and township of the Little Perare, and lying and being and situated as follows: Beginning at the sou'west corner of John Ruddell's land, thence down the redge of s'd *byo* one hundred and forty-two rods, thence a north'ardly co'rse for quantity, it being part of the land that orig*a*n*n*ely to James Y. G. O'Carrel and by said James Y. G. O'Carrel conv*a*yed to George Ruddell. I do convey to the said William Rogers, his heirs, forever *forever* against all lawful cla'mes or demands of all pe*a*rsons whomsoever that may hereafter claim s'd land as I warr*e*nt and defend the same, me and my heirs to him, s'd Rogers and his heirs.

I' testimony whereof the said George Ruddell have put his hand and seal in presents of the day above men*che*'ned.

GEORGE RUDDELL. [SEAL.]

FERD. S. HARRISON.
ROBERT MONELLY.
THOMAS BROWNY.
SPEAR FORT.

527 TERRITORY OF MISSOURI,
County of New Madrid, sct:

Be it remembered that before me the undersigned, a justice of the peace in and for the county and territory aforesaid, personally came and appeared Spear Fort, one of the subscribing witnessess to the within deed from George Ruddell to William Rogers, who being by me duly sworn, did depose and say that the said George Ruddell did in his, deponent's, presence, acknowledge and deliver the within indenture to the said William Rogers as his free voluntary act and deed, and that he, deponent, subscribed his name as a witness to the execution thereof at the request of the said George Ruddle.

Given under my hand this 18th day of October, 1817.

ROBT. D. DAWSON, *J. P.*

Filed and recorded December 19th, 1871.

W. C. KENNETT, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder of said county, certify that the foregoing is true copy of an instrument in writing executed by George Ruddell, together with the acknowledgement and date of filing thereof, as the same remains on record in my office in book 438, page 337.

Witness my hand & official seal this 25th of Oct. 1876.

[SEAL.] D. H. MAC ADAM,
Recorder.

Deed fr. Wm. Rogers to John Ruddell.

This indenture, made and entered into this eighteenth day of August, in the year of our Lord one thousand eight hundred and seventeen, between William Rogers, of the county of New Madrid and Territory of Missouri, party of the one part, and John Ruddell, of the same place, party
528 of the other part, witnesseth, that the said William Rogers for and in consideration of the sum of four hundred dollars lawful money to him in hand paid by the said John Ruddell, the receipt whereof is hereby acknowledged, hath granted, sold, remised, released, conveyed, and confirmed, and by these presents doth give, grant, bargain, sell, remise, release, convey, and confirm unto the said John Ruddell, his heirs and assigns forever, all that certain piece or parcel of land containing two hundred arpents, beginning at the southwest corner of the said John Ruddell's other land and running thence down the ridge of the bayou (142 rods) one hundred and forty-two rods, thence a northwardly course for quantity, it being

part of the land that was originally granted and confirmed to James Y. O'Carroll, and by him conveyed to George Ruddell, and by said Ruddell conveyed to the aforesaid William Rogers by deed dated February 3d, 1811: To have and to hold the said described land to the said John Ruddell, his heirs and assigns forever, and the said William Rogers hereby binds himself, his heirs, executors, and administrators to warrant and forever defend the said tract of land to the said Ruddell, his heirs and assigns, against the lawful claims of all persons whomsoever claiming the same.

In testimony whereof I, the said William Rogers, hereunto set my hand and seal the day and year aforesaid.

WILLIAM ROGERS. [SEAL.]

Signed, sealed, and delivered in the presence—
ROBERT D. DAWSON.
JOSH. STORY.

TERRITORY OF MISSOURI,
County of New Madrid, ss:

Be it remembered that before me the undersigned, a justice of the peace for the county and Territory aforesaid, personally appeared the within-named William Rogers, who signed and sealed the within inden-
529 ture, and acknowledged the same to be his free voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and seal the 18th day of August, 1817.

ROBT. D. DAWSON, *J. P.*

Filed and recorded December 19th, 1871.

W. C. KENNETT, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder of said county, certify that the foregoing is a true copy of an instrument in writing executed by William Rogers, together with the acknowledgement and date of filing thereof, as the same remains of record in my office, in book 442 page 84.

Witness my hand & official seal this 26th day of Oct., 1876.

[SEAL.] D. H. MAC ADAM, *Recorder.*

Also the account alleged to have been filed by Robert Wash in the case of Clay vs. Hertzog's heirs, as follows:

% filed by R. Wash in ans. to Clay vs. Hertzog's heirs.

(A. No. 1, calculated up to 10th of July, 1831.)

Am't rec'd of Bates & Haney:

March 31, 1823	$1,000	00
Interest for 8 y'rs 3 m's & 10 d'ys at 10 per cent	827	80
Am't rec'd through W. P. Hunt, esq., Dec'r. 25th, 1823	500	00
Interest for 7 y'rs 6 months & 15 days at 10 per cent	377	08
Am't rec'd through the hands of Y. F. Riddick, Feb'y 10, 1826	479	00
Interest thereon 5 years & 5 months at 10 per cent	259	45

Am't rec'd of J. Coulter, esq., Nov. 11th, 1829.....	1,900 00
Interest thereon 1 year & 8 months at 10 per cent.....	320 00
Am't rec'd of H. R. Gamble, esq., May 6, 1831.....	603 00
Interests thereon 2 months & 4 days at 10 per cent.....	10 30
	$6,276 63

530 Being 1,000 827.80
500 377.08
479 259.45
1,900 320.00
603 10.30

of principal 4,482, and 1,794.63 of interest.

Am't received by Col. O'Fallon:

November 10th, 1824.....	$4,150 00
Interest thereon 6 years 7 months at 10 per cent.....	2,743 75
November 1st, 1825.....	2,900 00
Interest thereon 5 years 8 months & 10 d'ys at 10 per cent.....	1,651 38
	$11,445 13
Am't due by Hertzog..... 9,549 00	6,276 63
Int's 8 y'rs 8 mo. 15 days ... 8,315 59	
	$17,721 76
$17,864 59 Balance due..	142 83
	$17,864 59

(A. No. 2, interest calculated up to the 6th of May, 1831.)

Am't due by Hertzog to Devotion under the deed of trust executed the 26th of Oct., 1822.....	$9,549 00
Interest on the same at the rate of 10 per centum per annum, up to the 31st of March, 1823, 5 months & 5 days.....	419 87
	9,968 87
Cr. by $1,000 rec'd of Bates & Haney.....	1,000 00
	$8,968 87
Int. on this sum up to the 25th of Dec., 1823, 8 months & 25 days at the rate of 10 per cent.....	660 37
	9,629 24
Cr. by $500 rec'd of Bates & Haney through the hands of Wilson P. Hunt.....	500 00
	$9,129 24
Interest thereon up to the 10th of Nov., 1824, 10 months & 15 days, 10 per cent.....	804 75
	9,933 99

Cr. by 4,150 rec'd of Jno. O'Fallon	4,150 00
	$5,784 00
Int. on the same up to Nov. 1st, 1825, 11 months 20 days, 10 per cent	562 30
	6,346 30
Cr. by $2,900 rec'd of Jno. O'Fallon	2,900 00
	$3,446 30
Interest up to the 10th of Feb., 1826, (three months & ten days)	105 25
	3,551 55
Cr. by 479, rec'd of Bates & Haney through the hands of Thos. F. Riddick	479 00
	$3,072 55
531	3,072 55
Int. on the same up to the 11th of Nov., 1829, 3 years & 9 months	1,152 50
	4,225 05
Cr. by $1,900 rec'd of Bates & Haney through the hands of J. D. Coulter	1,900 00
	$2,325 05
Int. on the same up to May 6th, 1831, one year 5 months & 25 days	112 97
	2,438 02
Cr. by $603 rec'd of Bates & Haney through the hands of H. Gamble	603 00
	$1,825 02

(To the reading of this account plaintiffs objected that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs excepted thereto at the time.)

He then read the remittitur in the case of Gibson vs. Chouteau, as follows:

Remittitur in case Gibson vs. Chouteau et al.

Supreme court of Missouri, April term, 1872.

CHARLES GIBSON, RESPONDENT,
vs.
CHARLES P. CHOUTEAU AND JULIA MAFFIT,
appellants.

I hereby accept the affimance of the judgement below upon the condition

stated in the opinion of the court this day delivered, and enter this my remittitur as to all the land embraced within and covered by the interferences mentioned in the opinion, and for which judgement below was rendered in my favor, and I refer to the opinion as part hereof.

C. GIBSON.

ST. LOUIS, *May* 3, 1872.

(Endorsed:) Charles Gibson, resp., vs. Charles P. Chouteau et al., appl'ts. Remittitur. Filed May 3, 1872. Francis Minor, cl'k, per Baier, d. c.

A true copy.

[SEAL.] Attest: J. THORNBURGH, *Cl'k.*

532 He then read New Madrid certificate No. 80, with the assignment thereon, as follows:

New Madrid certificate No. 80.

No. 80. A duplicate, the original alleged to have been lost.

OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, Nov. 28*th*, 1815.

I certify that a lot of one arpen in the village of Little Prairie, in the county of New Madrid, which appears from the books of this office to be owned by George Roddle, has been materially injured by earthquakes, and that in conformity to the provisions of the act of Congress of 17th February, 1815, the said George Roddle, or his legal representatives, is entitled to locate any quantity not exceeding one hundred and sixty acres on any of the public lands of the Territory of Missouri the sale of which is authorized by law.

FREDERICK BATES.

Assignment appended to above certificate.

I, George Roddle, of the county of Lawrence, do assign, transfer, and set over all my right, title, claim, interest, and power in, to, or under the foregoing and annexed certificate, it being certificate No. 80 (eighty) to Taylor Berry, his heirs, or assigns, forever, and do hereby authorize the said Taylor Berry, his heirs, or assigns, to locate for his or their own use and benefit the quantity of land mentioned in said certificate, and to do all other lawful acts that may be necessary to complete his title to the same.

In testimony whereof I have hereunto set my hand and seal this 19th day of January, eighteen hundred and eighteen.

GEORGE RUDDELL. [SEAL.]

Signed, sealed, and delivered in presence of—
HENRY CASSIDY.

(Endorsement on assignment:)

TERRITORY OF MISSOURI,
County of St. Louis, ss:

533 Personally appeared before me the subscriber, a justice of the peace in and for the county aforesaid, Henry Cassidy, who being

duly sworn on the Holy Evangelists of Almighty God, doth depose and say that he was present at and saw the within-named George Ruddle execute the within instrument of writing and acknowledge the same to be his act and deed for the purposes therein mentioned, and that he, the deponent, signed his name to the same as a witness.

HENRY CASSIDY.

Sworn to and subscribed this 2nd day of March, 1818, before me.

I. V. GARINER, *J. P.*

Taylor Berry enters for Thomas Hubbard, as the legal representatives of George Roddle, one hundred and sixty acres of land, by virtue of a New Madrid certificate dated November 28th, 1815, & numbered No. 80, in the following manner, to wit, the quarter section upon which the said Thomas Hubbard now lives, it being the northwest quarter of section No. 35, township No. 49 north, & range No. 17 west, of the 5th principal meridian.

May 17, 1817.

THOMAS HUBBARD,
By his agent, TAYLOR BERRY.

Class No. 119.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, November 1st, 1873.

This is to certify that the foregoing is truly and correctly copied from the original New Madrid certificate No. 80, with the accompanying papers attached thereto, which are up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder.*

534 (To the reading of these the plaintiff objected that the certificate was incompetent and irrelevant, and that the assignment was not authentic, and was also incompetent and irrelevant. The court overruled the objection, and plaintiffs excepted thereto at the time.)

He then read the proceedings for the confirmation of lot 98 to George Ruddle as follows:

Proceedings for confirm'n of lot 98 to Geo. Ruddle.

TUESDAY, *July 9th*, 1811.

Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

George Ruddle claiming lott No. 98, square No. 25, situate district of New Madrid, village of Little Prairie, produces to the board and order of survey from Henry Peyroux, commandant, dated 27th February, 1801, a platt of survey of same dated January 3d, 1806, signed Francis Lesiuer. The following testimony in the claim and generally as to lotts in the village of Little Prairie, taken as aforesaid at New Madrid, June 22d, 1808:

Pierre Laforge, duly sworn, says that these lots have been inhabited & cultivated at different times and in succession from the year 1798 till 1803, at which time they were all inhabited.

It is the opinion of the board that this claim ought not to be confirmed.

Board adjourned till Thursday next, 8 o'clock a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, Oct. 31*st*, 1873.

This is to certify that the above is truly aad correctly copied from
535 page 214 of a book marked "Commissioner's Minutes, No. 5," of the proceedings of the 1st board of commissioners appointed under the act of Congress of the 2d of March, 1805, which book is up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

Opinions of the recorder of land titles for Missouri Ter'y as to claims entered under act of 13th June, 1812, & proven before 1st Jan'y, 1814, as provided by the act of the 3d March, 1813, comprehending also the claims in the late district of Arkansas, which by act of 2d August, 1813, were permitted to be entered until 1st Jan'y, 1814, and proven until 1st of July, 1814, together with the extensions of quantity provided by 4' sec. of the act of 3d March, 1813, and confirmations under the act of 12th April, 1814.

REPORT.

Town lots and out lots within the Territory of Missouri selected by Frederick Bates, recorder of land titles, from the books of the late board of commissioners for confirmation, under the act of Congress of 13th June, 1812.

Village of Little Prairie, cont'd.

Rept. 408. George Roddle. Lot No. 98, square No. 25. One arpen,
5 p. 214.
(On the margin:) H. Peyroux, comd't survey.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, Oct. 31*st*, 1873.

This is to certify that the above is truly and correctly copied from pages 43 and 51 of book No. 3, except the caption, which is truly copied from page 1 of book No. 1, being two of the five small books, with the following endorsement on the first and also on the fifth book, believed to be in the handwriting of Frederick Bates, to wit: "These five small books are originals, in the proper handwriting of the undersigned, being his
536 decision on land claims since the adjournment of the late board. They were arranged and fairly transcribed for report to the Commissioner of the General Land Office, but not yet recorded in the books, because they have no authority till sanctioned by the Government. St.

Louis Nov. 1st, 1815, Frederick Bates, recorder land titles," which books are up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

(To the reading of these proceedings the plaintiffs objected that the same were incompetent and irrelevant. The court overruled the objection & plaintiffs excepted thereto at the time.)

He then read, subject to the same objection and exception, the U. S. patent to George Ruddle dated June 1, 1820, as follows:

James Monroe, President of the United States of America, to all to whom these presents shall come, greeting:

U. S. patent to Geo. Roddle.—Dated June 21, 1820.

Know ye that George Roddle, having deposited in the General Land Office a certificate numbered twenty-nine of the recorder of land titles at St. Louis, Missouri, whereby it appears that in pursuance of an act of Congress passed the 17th of February, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in Missouri Territory, who suffered by earthquakes," the said George Roddle is confirmed in his claim to one hundred and sixty acres of land, being the southwest quarter-section twenty-seven, in township forty-nine (north) of range fourteen (west of the fifth principal meridian line), and being survey number two thousand six hundred and fifty-one.

There is therefore granted by the United States unto the said George Roddle the tract of land above described. To have and to hold the said tract, with the appurtenances, unto the said George Roddle, his heirs, and assigns forever.

In testimony whereof I have caused these letters to be made
537 patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-first day of June, in the year of our Lord one thousand eight hundred and twenty, and of the Independence of the United States of America the forty-fourth.

By the President:

JAMES MONROE.
J. MEIGS,
Commissioner of the General Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1876.

I, U. J. Baxter, Acting Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of a patent dated June 21, 1820, in favor of George Roddle, his heirs and assigns, as the same appears of record in the General Land Office.

In testimony whereof, I have hereunto subscribed my name, and cause' the seal of this office to be affixed, at the city of Washington, on the day and year above written.

{ SEAL OF GEN'L LAND OFFICE. }

U. J. BAXTER,
Acting Commissioner of General Land Office.

He also read, subject to the same objection & exception, New Madrid certificate No. (81) eighty-one, as follows:

New Madrid certificate No. 81.

No. 81. A duplicate, the original alleged to be lost.

OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, Nov'r 28th, 1815.

I certify that a lot of one arpen in the village of Little Prairie, in
538 the county of New Madrid, which appears from the books of this office to be owned by George Roddle, has been materially injured by earthquakes, and that in conformity to the provisions of the act of Congress of 17th February, 1815, the said George Roddle, or his legal representatives, is entitled to locate any quantity not exceeding one hundred and sixty acres, on any of the public lands of the Territory of Missouri the sale of which is authorized by law.

FREDERICK BATES.

(Endorsement:) I, Taylor Berry, legal representative of the within-named Geo. Roddle, do sell, assign, & transfer the within certificate, & all my right, interest, & power in, to, and under the same to Anderson Woods, his heirs and assigns forever, and do authorize the said Woods to do all proper acts that may be necessary to vest in him the right to the land that may be located by virtue of the same.

Witness my hand and seal this 6th day of August, 1817.

TAYLOR BERRY. [SEAL.]

Test:
JOHN SCOTT.

Taylor Berry enters for Anderson Woods, as the legal representative of George Roddle, one hundred and sixty acres of land, by virtue of the recorder of land title's certificate for a New Madrid claim, in the name of said Roddle or his legal representatives, number eighty-one, in the following manner, to wit: The southwest quarter of section No. 27, township No. 49 north, and range No. 14 west of the 5th principal meridian, north of the Missouri River.

TAYLOR BERRY,
For Anderson Wood.

ST. LOUIS, MISSOURI TERRITORY, *Sept. 23d,* 1817.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
539 *St. Louis, October 31st,* 1871.

This is to certify that the foregoing is truly and correctly from the original New Madrid certificate No. 81, and the accompanying papers attached thereto, which are, up to this day, preserved on file in this office.

STILLMAN O. FISH,
Recorder.

And also subject to the same objection & exception proceedings for the

confirmations of lot No. 99, and patent to George Ruddle, dated June 20th, 1820, in the words and figures following:

Proceed'gs confirmed, lot 99 to George Roddle.

TUESDAY, *July 9th*, 1811.

Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

George Roddle, claiming lott No. 99, square No. 25, situate district of New Madrid, village of Little Prairie, produces to the board an order of survey from Henry Peyroux, commandant, dated 27th February, 1801, a platt of survey of same, dated January 3d, 1806, signed Francis Lesieur.

The following testimony in this claim, and generally as to lots in the village of Little Prairie, taken as aforesaid at New Madrid, June 22d, 1808.

Pierre A. Laforge, duly sworn, says, that these lots have been inhabited & cultivated at different times and in succession from the year 1798 till 1803, at which time they were all inhabited.

It is the opinion of the board that this claim ought not to be confirmed.

Board adjourned till Thursday next, 8 o'clock a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

540 OFFICE OF THE U. S. RECORDER OF LAND TITLES.
St. Louis, October 31st, 1873.

This is to certify that the above is truly and correctly copied from page 214 of a book marked "Commissioner's Minutes No. 5" of the proceedings of the 1st board of commissioners appointed under the act of Congress of the 2d of March, 1805, which book is up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

Opinions of the recorder of land titles for Missouri Terr'y as to claims entered under act of 13th June, 1812, & proven before 1st Jan'y, 1814, as provided by the act of the 3d March, 1813, comprehending also the claims in the late District of Arkansas, which by act of 2d Aug., 1813, were permitted to be entered until 1st Jan'y, 1814, and proven until 1st of July, 1814, together with the extensions of quantity provided by 4' sec. of the act of 3d March, 1813, and confirmations under the act of 12th April, 1814.

REPORT.

Town lots and out lots within the Territory of Missouri selected by Frederick Bates, recorder of land titles, from the books of the late board of commissioners for confirmation under the act of Congress of 13th June, 1812.

Village of Little Prairie, cont'd.

Rep't 408. George Roddle. Lot No. 99, square No. 25. One arpen, 5 p., 214.

(On the margin:) H. Peyroux, com'd't survey.

OFFICE OF THE U. S. RECORDER OF LAND TITLES.
St. Louis, October 31st, 1873.

This is to certify that the above is truly and correctly copied
541 from pages 43 and 51 of book No. 3, except the caption, which is truly copied from page 1 of book No. 1, being two of the five small books, with the following endorsement, on the first and also on the fifth book, believed to be in the handwriting of Frederick Bates, to wit: "These five small books are originals, in the proper handwriting of the undersigned, being his decisions of land claims since the adjournment of the late board. They were arranged & fully transcribed for report to the Commissioner of the General Land Office, but not yet recorded in the books, because they have no authority till sanctioned by Government. St. Louis, Nov. 1st, 1815. Frederick Bates, recorder of land titles," which book is up to this day preserved on file in this office.

STILLMAN O. FISH,
Recorder.

2d U. S. patent to Geo. Ruddle, dated 21' *June*, 1820.

James Monroe, President of the United States of America to all to whom these presents shall come, greeting:

Know ye, that George Roddle, having deposited in the General Land Office a certificate numbered twenty-three of the recorder of land titles at St. Louis, Missouri, whereby it appears that in pursuance of an act of Congress passed the 17th of February, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid who suffered by earthquakes, the said George Roddle is confirmed in his claim to
542 one hundred and sixty acres, being the northwest quarter of section thirty-five in township forty-nine (north), of range seventeen west of the fifth principal meridian line, and being survey number two thousand five hundred and eighty-six.

There is therefore granted by the United States unto the said George Roddle the tract of land above described, to have and to hold the said tract with the appurtenances unto the said George Roddle, his heirs and assigns forever.

In testimony whereof I have cause' these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-first day of June, in the year of our Lord one thousand eight hundred and twenty and of the Independence of the United States of America the forty-fourth.

By the President.

JAMES MONROE.
J. MEIGS,
Commissioner of the General Land Office.

543 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1876.

I, U. J. Baxter, Acting Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of a patent dated June 21, 1820, in favor of George Roddle, his heirs and assigns, as the same appears of record in the General Land Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

{ SEAL OF GENERAL LAND OFFICE. } U. J. BAXTER,
Acting Commissioner of General Land Office.

He also read, subject to the same objection & exception, New Madrid certificate No. 358, dated January 20, 1818, to George Ruddle, and proceedings for the confirmation of six hundred arpents of land to George Ruddle, as follows:

New Madrid certificate No. 358.

No. 358.] OFFICE OF THE RECORDER OF LAND TITLES,
St. Louis, Jan'y 20, 1818.

I certify that a tract of six hundred arpens of land *on* Mississippi, in the county of New Madrid, which appears from the books of this office to be owned by George Ruddell, has been materially injured by earthquakes, and that in conformity to the provisions of the act of Congress 17th February, 1815, the said George Ruddell, or his legal representatives, is entitled to locate three hundred and twenty acres on any of the public lands of the Territory of Missouri the sale of which is authorized by law. The said quantity of 320 acres, making, together with the cert's No. 80 & No. 81, heretofore issued to said Ruddle, the amount of relief provided for him by the said act.

FREDERICK BATES.

544 (Endorsed:)

I assigned, for value received, the within certificate to John Whittenburgh this 28th day of July, 1818.

WM. KINCHELOE.

William Thompson locates for John Whitenburgh, as the legal representative of George Ruddle, enters three hundred and twenty acres of land, by virtue of certificate (No. 358) issued by Frederick Bates, esq'r, recorder of land titles for the Missouri Territory, in conformity to an act of Congress passed the 17th day of February, 1815, and dated January 20th, 1818, being the northeast fractional quarter & northwest quarter of twenty-eight, & as much off the N. part of the southwest quarter of section twenty-eight as will make the quantity of three hundred and twenty acres in township No. 21 north, range No. 14 east 5th principal meridian.

St. Louis, April 4th, 1823.

WM. THOMPSON,
Administrator de bonis non of the Estate of John Whittenburgh, deceased.

To E. T. LAUGHAM,
Surveyor of Public Lands, &c.:

SIR: In 1823 I, as administrator of John Whittenburgh, located New Madrid certificate No. 358 on certain lands in New Madrid County.

The certificate is in favor of George Ruddle or his legal representatives, and there were regular conveyances to Wm. Kincheloe, who conveyed to John Whittenburgh. I have had the land in possession ever since said location as such administrator, & my tenant is now in possession of it. I understand that one Tanner has procured from your office an order of survey of this location, on the pretense that he has some interest, and that he has gone with the intent to have the location surveyed, & intend' to procure the patent to be issued & to get possession of it. My object
545 in this communication is to prevent this result. As the locator and possessor of this claim & the land located, it appears to me that I alone have the right to receive the patent certificate & the patent. I request, therefore, that you will recall the order of survey given to Tanner and give me one; or, if you think that improper, that you will, on the return of the survey, refuse to give to him the patent certificate, & will give the same to me, who am the proper person to receive it, as appears by the records of your office.

March 3d, 1836.

Y'rs, &c.,

WM. THOMPSON.

(Endorsed:) Survey for obtaining the patent certificate to be delivered to Mr. Spaulding, attorney at law. 3d March, 1836.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, October 31st, 1873.

This is to certify that the foregoing is truly and correctly copied from the original New Madrid certificate No. 358, and the accompanying papers attached thereto, which are up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder.*

Proceed'gs for conf'n 600 arp'ts land to Geo. Ruddle.

Claim, statement, and notice.

George Ruddell claims to hold 600 arpens of land situated in the district of New Madrid under the 2nd section of the act of .

Concession.

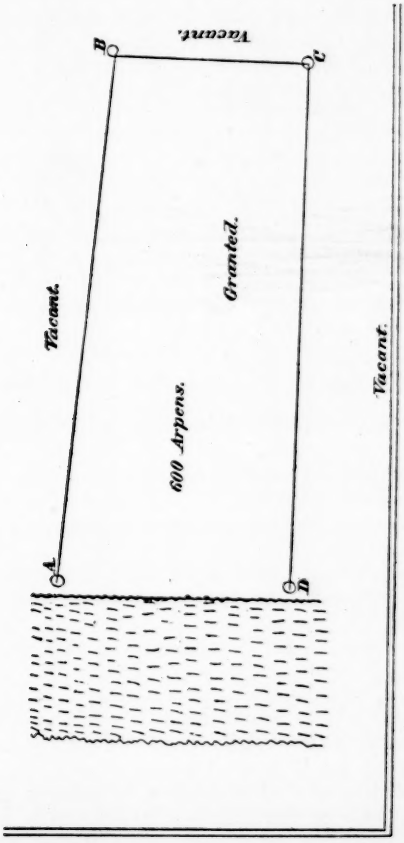
Senor Intend^{t} G^{l} Geo. Ruddell, Americano de nacion y habitante de la pequena praderia el D^{o} del Nuevo Madrid, con el mayor respeto á V. S. expone, que exeargarde de una g^{e} familia y havra *uneu* hegros y disiando estableurse en dicho D^{o} para ayudo de sortener le A. V. S. rendidamente suplica se dique concerder C. 600 á de tierra en el lugar elamada el Bayou de la Coupe du Chalant á se lequa de la emenciado praderia
546 y 15 de la Villa del Nuevo Madrid, lindando por see frente principal de 15 a. Al rio Mississippi de em lado y por see profrendi-

dad de 40 a'' enunciado bayou y de otros ladosa las tierras del Dom° cuya gracia espera mescar de see grande lunevolencia y conoceda justicia, en el Nuevo Madrid á 23 de *Tevriro*, 1801. Geo. Ruddell, concurriendo en el sup't las circunstancias que previene la instrucc'on lo halo dignode de la gracia que solicita, V. S. haro lo que halle por conveniente, Nueva Madrid á 23 de Fevriro de 1801.

(Signed) HENRI PEYROUX.

(Survey.)

By order of Cap'n Henry Peyroux to survey lands at the Little Prairie, bearing date the 10th of Feb'ry, 1801, I have surveyed for Geo. Ruddell 600 a. of land as follows: Beginning at A, two sycamores on the Mississipi, near Bayou Coup de Challant; thence S. 70° E. 40 arpens to B, two



box elders; thence N. 20° W. 15 arp's to C, a sycamore and two sweet gums; thence N. 70° E. 40 arpens to D, a white ash near the aforesaid Mississippi, to A, the beginning, containing six hundred arpens.

A true copy.

(Signed) JOSEPH STORY,
Surveyor New Madrid District.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, October 30th, 1873.

This is to certify that the foregoing is truly and correctly copied from page 420 of a book, marked "Record-book A," of the recorder of land titles, kept under the provisions of the act of Congress of the 2d March, 1805, which book is up to this day preserved on file in this office.

STILLMAN O. FISH.

547 MARCH 15th, 1806.

The board met agreeably to adjournment. Present, the honorable Clement B. Penrose & James L. Donaldson, esq'res.

George Ruddell claiming as aforesaid 600 arpens of land, situate on the Mississippi, near the Little Prairie, produces a petition together with a recommendation from Henry Peyroux for a concession dated February 23, 1801, and a certificate of survey of the same.

George Wilson, being duly sworn, says that the said claimant prior to & on the 20th day of December, 1803, actually inhabit' & cultivate' the said tract of land.

The board grant said claimant 600 arpens of land, situate as aforesaid, as per his said petition & the recommendation thereto annexed.

On motion, adjourned to Monday the 17th instant, ten o'clock a. m.

CLEMENT B. PENROSE.
JOS. L. DONALDSON.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, 30th October, 1873.

This is to certify that the above is truly and correctly copied from page 173 of a book marked "Minutes 1" of the proceedings of the 1st board of commissioners appointed under the act of Congress of the 2d March, 1805, which book is up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder.*

WEDNESDAY, *June 28th*, 1809.

Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

548 Book 1, page 173, George Ruddle claiming 600 arpens of land, situate Little Prairie, district of New Madrid. Laid over for decision.

Board adjourned till Friday next, nine o'clock a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, 30th October, 1873.

This is to certify that the above is truly and correctly copied from page 111 of a book marked "Minutes 4" of the proceedings of the 1st board of commissioners appointed under the act of Congress of the 2d March, 1805, which book is up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder*.

THURSDAY, *December 13th*, 1810.

Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

Cert. No. 536. George Ruddell claiming 600 arpens of land. See book No. 1, page 173; book No. 4, page 111. The board grant to George Ruddell six hundred arpens as described in a plat of survey found on record in book A, page 420, of the recorder's office, and dated the February, 1801, on Joseph Story's surveyor's registery.

Board adjourned till to-morrow, ten o'clock a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, November 1st, 1873.

This is to certify that the above is truly and correctly copied from page 28 of a book marked "Commissioners' Minutes No 5" of the pro-
549 ceedings of the 1st board of commissioners appointed under the act of Congress of the 2d March, 1805, which book is up to this day preserved on file in this office.

STILLMAN O. FISH, *Recorder*.

LOUISIANA:

Commissioners' certificate No. 536, December 13th, 1810.

We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to lands in the *the* Territory of Louisiana, have decided that George Ruddell, original claimant, is entitled to a patent under the provisions of the 2d section of an act of the Congress of the United States, entitled "An act for ascertaining and adjusting the titles and claims to lands within the Territory of Orleans, and the district of Louisiana," passed the second day of March, one thousand eight hundred and five, for six hundred arpens of land, situate in the district of New Madrid, on the river Mississippi, as described in a plat of survey found on record-book A, page four hundred and twenty, of the recorder's office, and dated the twenty-fifth February, one thousand eight hundred and one (Joseph Story's surveyor's registery), by virtue of a permission from the proper Spanish officer, and also of actual inhabitation and cultivation prior to and on the twentieth day of December, one thousand eight hundred and three.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
St. Louis, October 30th, 1873.

This is to certify that the above is truly and correctly copied from the original commissioners' certificate numbered 536, which certificate is up to this day preserved on file in this office in a book marked "Commissioners' certificate 401, 600."

STILLMAN O. FISH, *Recorder.*

550 He also read in evidence patent certificate No. 447 to James Y. O'Carroll or his legal representatives, dated 16 August, 1841, as follows:

Pat. cert. No. 447 to Jas. Y. O'Carroll or his leg'l reps., dated 16 Aug., 1841.

Date of p't c.	No. of p. c.	No. l. c.	Original claimant.	Survey No.	Quantity in acres.	To whom delivered.
1841.						
August 16	447	150	James Y. O'Carroll or his leg'l rep's.	2498	640	G'l Wm. Wilburn.
Sept. 17	.....	.....	This day reported to the Commissioner of the Gen'l Land Office.	.....	.....	
1862.						
26th March	494	150	James Y. O'Carroll or his legal representatives.	2498	640	Sent to Commissioner.
			But there is deducted from that area of 640 acres interferences with other claims, leaving in pat. cert. No. 494.	.....	291.45 acres.	

ADOLPH RENARD, *Recorder.*

OFFICE OF U. S. RECORDER OF LAND TITLES
FOR THE STATE OF MISSOURI,
St. Louis, 20 December, 1862.

I certify that the above and foregoing is a true and correct transcript from the record of the list of patent certificates in this office in the matter of the claim of James Y. O'Carroll or his legal representatives, whereby it appears that patent certificate No. 447, issued 16th August, 1841, being in controvention of the directions of the Commissioner of the General Land Office, and erroneously issued, is set aside and annulled and declared void and of no effect.

THOMAS S. NELSON,
Recorder of Land Titles for the State of Missouri.

(NOTE.—The plaintiffs, while reserving their objection and exception to the admission of the letter from Blair to Gibson; the receipt of the clerk of the Supreme Court of the U. S.; the receipt of J. R. Lackland to Gibson, and the letter of F. A. Dick to Gibson as irrelevant, agree that these papers may be received with the same effect as if the facts therein recited were testified to in open court, by the said Blair, Dick, clerk of the Supreme Court, and J. R. Lackland. The objection and exception reserved
551 are to the relevancy of the facts so recited to any issue in this cause.)

The defendant gave in evidence the record of an action of ejectment commenced by him on 31 January, 1857, against Pierre Chouteau, jr., for the premises in dispute, dismissed by said defendant, November 17, 1862, as follows:

RECORD OF EJECTMENT.—GIBSON VS. P. CHOUTEAU, JR., 31 JAN., 1857.

Petition.

St. Louis County, St. Louis land court.

CHARLES GIBSON, PLAINTIFF,
vs.
CHARLES P. CHOUTEAU & JOHN COOK, DEFENDANTS.

The plaintiff states that on the 29th day of January, 1857, he was lawfully entitled to the possession of a tract of land in said county, containing about sixty-four acres, being a part of United States survey *to* twenty-four hundred & ninety-eight, & which part is bounded east by the New king's highway & land of Mrs. Mary MacRee; south by land in the possession of Henry Bonning, & belonging to said MacRee; west by the Gratiot league, & north by the Clayton road; and the plaintiff being so entitled to the possession of said land, the defendant afterwards & on the same day & year unlawfully entered into and withholds from the plaintiff the possession thereof to his damage in the sum of five thousand dollars, for which & the possession of said promises the plaintiff asks judgement against the defendants.

C. GIBSON, with
E. BATES, *P. Q.*

STATE OF MISSOURI,
County of St. Louis:

Charles Gibson, being sworn, says he believes the above petition & the matter as therein stated are true.

C. GIBSON.

Sworn to and .

Summons.

COUNTY OF ST. LOUIS, *ss:*

The State of Missouri to the sheriff of St. Louis County, greeting:

552 We command you to summon Charles P. Chouteau & John Cook to appear before the judge of our St. Louis land court, on the first day of the next term thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the second Monday of March next, then and there to answer the complaint of Charles Gibson, as set forth in the annexed petition, and have you then and there this writ.

Witness Charles A. Mantz, clerk of our said court, with the seal thereof

hereto affixed, at office, in the city of St. Louis, this thirty-first day of January, in the year of our Lord eighteen hundred and fifty-seven.

[SEAL OF THE ST. LOUIS LAND COURT.] C. A. MANTZ, *Clerk.*

Sheriff's return.

Executed this writ in the county of St. Louis, State of Missouri, on the 31st day of January, 1857, by delivering a certified copy of same together with the petition, as furnished by the clerk, to the within-named Charles P. Chouteau; and by leaving a certified copy of the writ as furnished by the clerk at the usual place of abode of John Cook, with a white person of the family over the age of fifteen years.

JAMES CASTELLO, *Sh'iff.*
By ROBERT V. CORCORAN, *D'p'y.*

Fee, $2.00.

Answer.

The said defendant for answer to said petition states that he denies that said plaintiff was at any time lawfully entitled to the possession of the tract of land in said petition described, or that he unlawfully detains from said plaintiff the possession thereof, or that he has sustained the amount of damages claimed or any damages, or is entitled to any.

B. A. HILL,
J. R. SHEPLEY,
Att'ys for Def'ts.

553 *Extract from land court record-book No. 5, p. 359.*

MONDAY, *November 17th*, 1862.

CHARLES GIBSON
vs.
CHARLES P. CHOUTEAU & JOHN COOK. } Dismissal.

Now at this day, the plaintiff herein not further prosecuting this suit, it is order' and adjudged by the court that this cause be dismissed at the costs of the plaintiff, and that execution issue therefor.

The defendant then gave in evidence, in connection with the record of the case of Gibson vs. Chouteau, and claiming the same to be a part of it, the following papers, that is to say:

Ext's fr. brief of Glover & Shepley in eject. suit, Gibson vs. Chouteau.—Paper marked "1" in blue pencil.

"It is made to appear by the record that the recital in the patent that said Mary was assignee of O'Carrol was utterly untrue, herself and husband having long before (August 30, 1838) sold and conveyed to Pierre Chouteau all the land in dispute held by virtue of the O'Carroll location, and all of the New Madrid warrant that appertained to said land. December, 1862, Mrs. McRee's attorney procured the annulment of the original

patent certificate under which Chouteau held his land. August 8,'62, Mary McRee conveyed to the plaintiff the whole of Chouteau's land nominally for $3,000, but nothing was in fact paid.

"There is no evidence in the cause that Mary McRee ever had any right, title, or interest whatsoever in or to the premises in dispute, unless the patent to her under the circumstances in which it issued constituted such title."

(The plaintiff objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

554 "3. If the several acts of location, viz, the New Madrid warrant, the survey & patent certificate, had any vitality and value they did not belong to Mary McRee, but to Mr. Chouteau, and if they could be perfected into a title, that could only be done for the benefit of the honest and lawful/ owner.

"So far as the land in dispute was concerned, Pierre Chouteau was the owner of it, and of the N. Madrid certificate conveying it. It was his title that was patented, and the patent related back to the date of the location, and must be considered as dated then. It was his interest in said certificate that was surrendered and taken up at the Land Department when the patent issued.

"The whole consideration received by Government for said patent, so far as the land in controversy is concerned, moved from Chouteau; Mary McRee surrendered nothing—had nothing to surrender.

"The plaintiff complains that certificate No. 150 and S. No. 2498 were void as against the United States, when the patent issued. Concede it; still, they did not belong to Mary McRee; they could not enure to her: they were the property of Mr. Chouteau, and if for them the land has been patented, the benefit must enure to him.

"The case is simply that where one is seeking to purchase land for himself, pays all the money, and by some mistake, accident, or trick, the deed is made to another against his will.

"4. The conveyances, beginning with that of O'Carroll to Ruddle, and ending with that of McRee and wife to Chouteau, vested in Chouteau and equitable claim to the certificate No. 150, and the location under it by S. 2498, as has been repeatedly decided by this court and by the Supreme Court of the United States (see 21 How., U. S., 481, where this identical location was held to be an equitable title).

555 "5. When one person holds an equitable title to land and another by fraud, accident, or mistake, against the will of the equitable owner, contrives to get the legal title in himself, a court of equity will divest that title and will hold it to be inferior to the equitable title. There are some things so essential to nature of the grant (of the legal title) that the great principles of justice and law would be violated did there not exist some tribunal to which an injured party and in which the means by which and elder title was acquired may be examined. (8 Mo. R., p. 94.) If a patent has been procured by any fraud or trick, equity will relieve. (7 Mo. R., p. 610.) But it is only after the patent has issued to the wrong party that the court will act, for, till then, the legal title is not in the power of the court. (9 Mo. R., p. 189.) After the legal title has passed out of

the Government, a court of equity will investigate the conduct of the land officers, and any conce'lement of papers without authority, or other wrong done will be redressed. (9 Mo. R., 320 to 323; 11 Mo. R., p. 586 to 592.) Nor will these officers be allowed illegally to divest parties of their right. (9 Mo. R., p. 573.) Any title paper unfairly obtained will be corrected in equity. (12 Mo. R., 333; 36 Mo. R., p. 187–193; 18 How., U. S., 87.)

"When a person originally entitled to a bounty from Government assigned it to another and afterwards took a patent to himself, it was held to belong to his assignee by relation. (21 How., U. S., 228.) The confirmation of a claim perfects the same as a title against the Government, but leaves it to its original value when placed in opposition to the rights of another person. (11 Martin R., 212; 24 Mo. R., 132–3.)

"Where several parties claim title to property with which a special tribunal may deal as between one party and the Government, and
556 disregard the rights of others, the latter may come into the ordinary courts of justice and litigate their claims. (20 How., U. S., p. 8; 1 Peters, 212; 9 How., U. S., 328; 14 How., U. S., 377; 18 How., U. S., 44.) The questions in these last-mentioned cases were (1) whether a party could interpose his equity between the Government and its patentee; (2) whether the decisions of officers of the Land Department were conclusive on all parties, and even the Government, till judicially vacated; and it was held they were not conclusive, but the equitable right of parties cut off by issuing a patent or other official acts would be set up. The case in 1 Peters, 212, was that of a claim against the Government of Spain, assumed under treaty by United States.

"The claim was allowed by commissioners at the of it, and the money was paid to him; held, the allowance only established the validity of the claim but not the ownership of it, and that B might recover the money from A by proving his right to it. (See 21 How., U. S., 294; 5 Cranch R., 591.) Mary McRee had no claim to the land in dispute prior to her patent; she did not get her patent on a void entry; she got it on no entry at all. The patent, so far as she was concerned, was a grant without a single preliminary step to acquire land under any law of the United States.

"Her patent was her first title paper; of course she had no previous equity to rest upon. Chouteau had the only equity which the Government was to recognize or reject. The Government have, by issuing a patent to Mary McRee as assignee and legal representative of O'Carroll, recognized fully the claim of Chouteau or the consideration of the patent, and in equity the patent is his to the extent of the land in dispute."

557 (The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"8. If the patent merely conveyed the legal title, leaving Chouteau's equities outstanding, the plaintiff was not entitled to recover on a New Madrid title or a bare legal title. The plaintiff must have the best equitable title also or he has no standing in court.

"In 1839, the case of Bagnal vs. Broderick was heard and decided, 13 Peters, 436. In that case, Robertson, who had owned the claim, sold and

conveyed it; eleven years afterwards he took a patent on the same claim, and that patent was set up against Robertson's vendee. A majority of the judges that in an ejectment in a Federal court the patent must prevail (13 Peters, 450; Justice McLean dissenting), insisting the fraud could be shown in the ejectment (id., p. 451 to 458, inclusive, see his opinion). All the judges were of opinion that on the chancery side of the court the rights of Byrne, the equitable owner of the location under Robertson's deed, could be set up; that is, that the vendee of Robertson was honestly entitled to the land. What was to be done? All the title-papers in New Madrid cases were to some one or his legal representatives. The legislature of Missouri determined to open door to equitable titles in these cases. So they passed an act declaring (1) that in a New Madrid case a patent should be only prima facie evidence of title in its grantee. (2) That the title to land located by a New Madrid certificate should be determined in ejectment according to the equitable rights of parties. (Session acts 1838, '9, §§ 2 and 3.) The revision of 1845 copied the act (p. 442, §§ 12 and 13).

558 "In 1849 the new code of practice was adopted establishing distinctions of pleading in respect to law and equity.

"In 1855 the revision omitted the wood 'equitable,' but again declared a patent only prima facia evidence in an ejectment, and provided the suit should 'be determined according to the rights of the parties to the land,' meaning, of course, to recognize other rights than those of the patentee. By virtue of this statute, in actions of ejectment concerning New Madrid locations, a court of law has the same power as a court of equity. (10 Mo. R., 260.) In this case, the def't, who had no title, set up an outstanding equitable title and defeated the plaintiff. If, then, Chouteau had the best equity, and only equity, which undoubtedly was the fact, the plaintiff could not recover.

"The court seemed to think a legal title would support a recovery. The court told the jury the patent invested Mary McRee with the legal title, and this title was superior to any title shown by def't; that is, that the equity shown by def't was inferior to the legal title shown by pl'ff. This was an error. The same error was committed repeatedly by refusing instructions moved by defendant."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

Ext's fr. brief of B. A. Hill in eject. suit, Gibson & Chouteau.—Papers marked "1" in blue pencil.

"7th. Geo. Ruddle to Geo. Dameron, 1st Nov., 1815 (p. 34), a part of a tract of land of 200 arpens, situate in the Little Prairie Township, lying in the county of New Madrid, &c."

559 "This deed was held void for uncertainty in the case of Holme v. Strautman & McRee (35 Mo. Rep.), and is clearly so. See my appendix to H. R. Gamble's brief."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court over-

ruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"Def't shows the title of all parties to the land & claims directly under the deed of Sam'l & Mary McRee, the grantors, in 1838, to P. Chouteau of the same 64 acres now sued for by her grantee, Chas. Gibson."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"2nd. By the patent certificate (Rec., 109) the recorder of land titles, 26th Mar., 1862, declared 'that James Y. O'Carroll or his legal representatives is entitled to receive a patent for the aforesaid survey No. 2498, saving & excepting therefrom' the interfering claims.

"This patent certificate was issued under the act of 17 Feb., 1815, § 3, and it leaves no discretion in the Comm'r of the General Land Office, but requires him to issue a patent to Jas. Y. O'Carroll or his legal rep's, according to the long-established custom of the office. (5 Mo. Rep., 14; see Att'y-Gen'l Wm. Wirt's opinion, May 11th, 1820, page 9, vol. 2, Pub. Lands, Laws, Inst's, & Opinions.)"

560 (The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"4th. The patent by force of the act must go to O'Carroll or his leg. repr's, or to Christian Wilt. The patent certificate is issued to O'Carroll or his legal repr's, and the Comm'r of General Land Office, in violation of law & of the patent certificate, issues the patent to Mary McRee & her heirs, as assignee of James Y. O'Carroll."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"The recitals in the patent are not matters within the province of the Commissioner or of the President, & so far as these recitals introduce the name of Mary McRee, who is unknown to the records of the United States in this location No. 150, they are of no force. (Greenleaf's E., vol. 1, § 491–498.)"

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"By recorded deeds & decrees in equity the whole title vested in Sam'l McRee under Jas. Y. O'Carroll, & he & his wife, Mary McRee, conveyed the land in suit to Pierre Chouteau, and his title is as good as the deed of Sam'l McRee & wife in fee-simple absolute can make it.

"If Sam'l McRee had no title in 1839 to the New Madrid loca-

561 tion he had none at his death, & Mrs. McRee acquired none by his devise.

"6th. By statute of 1855, Title Ejectment, p. 692, sec. 11 & 12, it is enacted that "the title to the land located" by virtue of such (J. Y. O'Carroll) certificate or patent (Mary McRee, assignee of O'Carroll), shall be de-

termined "according to the right of the parties to the land, as" located by virtue thereof. This statute was passed for the purpose of meeting the hardship & technical injustice of the rule established in the case of Bagnell v. Broderick, 13 Peters, & to prevent circuity of action, and an appeal to a court of equity, section 12 of the said act, p. 692, declares that the real owner of the title shall prevail, & that the patent, to whomsoever issued, shall only be prima facie evidence of the title of patentee. See also act of 1839 & 1845, in pari materia. This statute is not ambiguous. It gives the def't in this action the clear right to defend against the patent to whomsoever issued, & show who is the real owner of the title.

"7th. The general assembly of Missouri had full power & authority to declare that such patent shall enure to the benefit of the real party in interest, the real owner of the land injured by earthquakes, & the real owner of the lands located in lieu thereof.

"It is a rule of evidence of property & of practice in an ejectment suit in this State, over which the general assembly has full control, and no valid objection can be made to the validity and efficacy of the act.

"If, therefore, the patent be held valid against the authority of Lessieur v. Price, 12 How., & Easton v. Salisbury, 21 How., still the title under the New Madrid location & patent, whatever it may be, enures to def'ts for the 64 acres conveyed to Pierre Chouteau by Sam'l McRee & Mary, his wife. (See Glover & Shepley brief, 5th point, as to the equities.)

562 "8th. If the certificate & patent do not enure to the benefit of James Y. O'Carroll for the reason that his title to the head right passed to Ruddell & to Tanner, & to Wilt, the holder of the title to the injured lands at the time the New Madrid location was made, then the patent would enure to the benefit of Wilt & his grantees."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"9th. That the deed of Sam'l McRee & wife to Pierre Chouteau passed all the title that McRee had in 1838 & all that he acquired by connecting the decree of 1821, by the bill he filed in 1845, is clear. (See the cases cited on pages 21 to 24, Sub. VIII, Boggs' brief.)

"The scope of the bill of McRee, in 1845, was to cure errors and defects in the old bill of 1821; and Sam'l McRee, grantor in the deeds of 1838 to Pierre Chouteau, solemnly avers of record in his bill in chancery (Rec., p. 82–3) that 'Christian Wilt purchased amongst other considerable real estate * * * a New Madrid' certificate issued by the recorder of land titles of the U. States to James Y. O'Carroll or his legal repr's, No. 150, which was afterwards located by said Wilt on a tract of land described as follows (here follows description): it being a certain location made by the said Christian Wilt, by virtue of a New Madrid certif., so-called, No. 150, dated 30 Nov., 1815, in the name of Jas. Y. O'Carroll or his leg. repr's, all of which will more fully appear by reference to said location, * * * and to the deed of transfer of said certificate from James Tanner, as the legal repr. of said O'Carrol, to said Christian Wilt, recorded in the recorder's office of St. Louis Co., book H, pages 237 et seq.' This bill in equity & the decree therein, is ample proof as against Sam'l

563 McRee, that he claimed his title under Christian Wilt, assignee of James Tanner, legal repr. of Jas. Y. O'Carroll."

"The deeds in the record are conclusive to the same effect, & the deposition of Branham locates the land (p. 42).

"10th. The deed of Saml. McRee & wife to Pierre Chouteau, dated the 30th of August, 1838, is operative as a deed in fee-simple absolute for the land described, so as to pass any after-acquired title under the 3d sec. of the act of 1835, title 'Conveyances.' (Bogy v. Shoal, 13 Mo., 365, & brief of Mr. Bogy, p. 23–4.)

"This deed of McRee to Chouteau contains the following words in granting clause, (p. 93–4), to wit, 'bargain, sell, release, quitclaim & convey unto Pierre Chouteau, jr., and his heirs,' the land in suit by description. Habendum to P. Ch., jr., & his heirs forever.

"This deed has the operative words of bargain & sale. Every estate of freehold or inheritance in possession in land may be conveyed by bargain & sale, & estates in remainder & reversion may be conveyed by bargain & sale. (Fox's case, 8 Coke's Rep., 93; Greenleaf's Cruise, vol. 2, Tit. XXXII, Deed, Ch. IX, § 51, notes p. 98, top page 139.)

"The words 'remise, release & forever quitclaim' are sufficient. (Jackson v. Fisk, 10 John., 456; Fisher v. Fields, id., 495, 503.) So the words 'make over & grant' (Jackson v. Alexander, 3 John., 484).

"The deed of bargain & sale operates under the statute of uses & it operates as a contract by wh. one person conveys his lands to another, for a pecuniary consideration, in consequence of which a use arises to the bargainee & the statute of uses immediately transfers the legal estate and possession to the bargainee. (Greenl'f Cruise on Real Prop., Tit. XXXII, Deed, Ch. IX, § 4, p. 98, top 139, vol. 2.)

"The deed also contains the operative words 'release & convey.'

564 "A release is a conveyance of a right to a person in possession. The operation of this release is by way of mitter le droit, transferring the right. (Greenl'f Cruise, vol. 2, top 111, side 79, Tit. XXXII, Deed, Ch. VI, sec. 26.)

"In this State the want of seisen or possession in the grantor shall not prevent the operation of his deed to pass the title & estate fully to the grantee. (Sec. 4, rev. code, 1845, 1835, & 1825. Title Conveyances, chap. 32 of 1845. Greenl'f Cruise, vol. 2, top 109, side 78, note, Tit. XXXII, Deed, Ch. VI, sec. 19.) So Mr. Greenleaf says that under that section the release of the owner, & though desired at the time, is held sufficient in the State of Missouri to pass the estate.

"The last operative words, is 'convey,' which imparts a grant and is sufficient to pass the title of the grantor. (Paterson v. Carneal, 3 A. K. March, 618.)

"A release, if made for a valuable consideration, will be construed to be any lawful conveyance by which the estate might pass. (Pray v. Pierce, 7 Mass. R., 381; Russell v. Coffin, 8 Pick., 148; 1 ship. Tomb, (Preston) 82; Lomax Dig., top 136, side 97, vol. 2.)

"It appears that Pierre Chouteau, jr., had been in possession of the land described in this deed from 1826 to the day of his death, in 1865.

"He was in possession by color of title under a deed from Louis Devotions, trustee, dated 27 Nov., 1824. (Rep. p. 68)."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

" Henry Clay, in 1839, admits that Wm. McRee had bought the land & paid for it in his life-time, and it is clear enough & does not admit
565 of a'greement that Sam'l McRee acquired under the statute of conveyances quoted all the title that Henry Clay conveyed to Ann & James McRee in 1839, and as far as Pierre Chouteau, jr.,' 64 acres were concerned the title so acquired in 1838 of Sam'l McRee enured to the benefit of the grantee Chouteau & passed immediately to him. It appears then that all the title to the New Madrid certificate of location No. 150, for the 64 acres at the west end thereof, acquired by Samuel McRee subsequent to the date of the deed to P. Chouteau, jr., in 1838, did pass to P. Chouteau, jr., by operation of the statute of 1835 & 1845."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

" The conveyances of the parties while they held the inchoate or equitable title to this New Madrid location, are effectual to pass the title subsequently vested by act of Congress in the legal rep's of James Y. O'Carroll. (Landers v. Brant; 10 How., 345, & other cases cited in Mr. Boggs' brief, p. 22, & in Glover & Shepley's brief, 5th point.)

" 12th. If it be true, as the authorities seem to prove, that the equitable or inchoate right or claim to a location or confirmation may pass by deeds or sheriff's sales, and that the title when vested by the Government will relate back to the inception of the claim, or right or equitable title, then the long possession of Mr. Chouteau under the deed of Sam'l McRee for the land from 1839 to 1862, 23 years, gives Mr. Chouteau the interest, title, and right of McRee in the land so possessed, as effectually as if McRee's deed had been made when he had all the claims & titles in his own right to this land vested in him. (Biddle v. Mellon, 13 Mo.)"

(The plaintiffs objected to the reading of this extract in evidence
566 on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

Ex't fr. Gibson's brief in Gibson v. Chouteau.—Paper marked "2" in blue pencil.

" As to the equitable defense:

" No such issue was made in the pleadings. The rules of pleadings require such issues to be framed with the same particularity as bills in chancery. (Cannon vs. Johnson, 20 Mo., 110; 36 Mo., 182; & 37 Mo., 461.")

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

Ex't fr. supp'l brief of Gibson v. Chouteau.—Paper marked "3" in blue pencil.

"7. As to the deed of Sam'l McRee & wife to defendant, Mr. Shepley, in his statement of facts, admitted that this was a quitclaim deed. Messrs. Hill & Shepley in Picot vs. Page, 26 Mo., 409, prove by good authorities that a quitclaim deed does not pass an after-acquired title.

"Where a quitclaim deed is made, although it purport to convey the fee, no relations continue to exist between the parties; no obligations rest on the conscience of the grantor. In Bogy vs. Schoab the court hold that if the deed is a quitclaim, altho' it may convey the fee it must go further and show that the grantee is not to be disturbed by any person & and that he must have an obligation resting on his conscience. The counsel exhibit much research and abilit*il*y in proving that the words used in this deed would be sufficient to pass a fee. Mr. Hill justly says the word 'release' is the strongest one used, but suppose this to be true, it does not help the defendants.

"The words used in the deed mentioned in Valle vs. Clemens would have passed the fee if the grantors had had it at the time. The word 'released' is discussed & its effect settled in that case."

567 "I thank Mr. Hill for mentioning what I failed to observe, that this deed recites that the land had been sold by Wash to Chouteau, who was then in possession under that deed, & claiming the land. Is it possible to affirm that McRee & wife intended to convey the fee-simple absolute when Chouteau was in possession, claiming the land under an*d* adverse title? The conclusion from this is irresist*a*ble that the parties intended to convey only such title as they then had. It is also clear from this, that McRee, having some understanding, probably verbal, with Mr. Clay to buy his title under the sheriff's sale, simply intended to convey that title to Chouteau, and as neither Clay nor McRee had the title, & as the deed was a mere 'quitclaim deed,' nothing passed.

"If this deed had been made after the decree of 1846 (8) when Wilt's title was vested in Samuel McRee, the case of Landers vs. Brant would be in point, but the question here is not whether the legal title enures to the equitable title. It is whether the after-acquired equity passed by a deed in which the grantor simply quitclaimed to the land.

"The doctrine of relation established in these cases don't apply here. Admit that the deed would pass any title McRee had in the land at the time of its execution, or previously to that time, that does not show that the subsequently acquired title would pass. In Landers vs. Brant the title related back; that is, to something previously existing. The appellant claims that this deed relates forward, which is a direction given to the doctrine of relation wholly new to me & the law-books."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

568 *Ex'ts fr. "Add'l reasons for rehearing by def'ts in G. v. Chouteau."—Papers marked "4" in blue pencil.*

In the Supreme Court.

"CHARLES GIBSON
"*vs.*
"PIERRE CHOUTEAU ET AL.

"The defendants, in addition to the reasons heretofore urged by them for the granting a rehearing in said cause, submit that it assumed by the

decision made in this cause that Sam'l McRee, when he made the deed to Chouteau in 1838, had no title to nor interest in the New Madrid location No. 150, and that Chouteau, by the deed of Wash and Devotion to him in 1822, acquired no legal or equitable right to the New Madrid certificate in the land located thereunder, and that Samuel McRee acquired by virtue of the decree in his suit against Hertzog and Wilt's heirs in 1848, for the first time, the right to and title in the New Madrid certificate and newly located land, and that having so acquired it, it did not enure to Chouteau by virtue of McRee's deed to him in 1838. It was also assumed that when McRee conveyed to Chouteau, he had no title.

"If this is an error, then the result does not follow, and we think we can conclusively show that it is so.

"In this branch of the case all parties are agreed upon the following facts:

"1st. That all the title to the New Madrid location No. 150 was vested in Christian Wilt.

"2d. That though vested in Christian Wilt, he held it only as surviving partner, had the title to the New Madrid certificate, and any land that might be located thereunder.

"That Christian left only one child, George Wilson Wilt. (See deed of Hertzog to Wash & McRee bill in chancery.)

569 "3d. That the title to the newly located land, under New Madrid certificate No. 150, first became vested on the return of the survey to the recorder of land titles in 1841. It follows, then, by the admission of all the parties that from the death of Christian Wilt, apart from any proceedings in court, the equitable title to this New Madrid certificate was vested in Joseph Hertzog, as surviving partner, and it was competent for him to sell it and any land located or to be located thereunder to any other person, and that person could, by filing a proper bill, obtain the title from the heirs of Christian Wilt, or such title as Christian Wilt originally acquired.

"What now is the effect of the deed of Wash & Devotion to Chouteau in 1822?

"I. And first upon the proposition that the proceedings and decree of 1821 in the case of Hertzog vs. Wilt is an absolute nullity. Not only erroneous but void. Still Chouteau acquired whatever title Hertzog had. Hertzog, as surviving partner, having the perfect right to the New Madrid location, conveys it in 1822 to Robert Wash to secure a large sum of money to Devotion, with authority upon default to sell at ten days' 'public' notice. Wash, on the 27 Nov., 1824, conveys this portion of the land thus conveyed to him to Chouteau, reciting that the deed was made by virtue of the power and authority vested in him by said deed. Now what did Chouteau acquire by that deed?

"1st. If no 'public' notice was given he held Joseph Hertzog's title precisely as Wash held it, and has been in possession as such trustee for the last 40 years.

"2d. If 'public' notice was given and the sale and deed made thereunder, then Chouteau acquired all of Joseph Hertzog's title to that land. We say it sufficiently appears that this sale was made under the pro-

570 visions of the deed from Hertzog to Wash. The deed of Wash, it is true, does not recite how it was done—does not particularize

how the notice was given, whether by newspaper or posting, or in what manner, but it does state that it was made by virtue of the power and authority in him vested by said Joseph Hertzog by a certain deed, &c., and that as it has been proved that possession was taken under it at once, and from that time has been held undisturbed for 40 years, it will be presumed under the recitals of that deed that the proper notice was given.

"Upon any theory then we have the legal title to whatever Joseph Hertzog owned, whether equitable or legal."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"If, then, this decree is not absolutely void, Chouteau acquired Hertzog's title, even if no title was conveyed by the deed of Wash. It has been assumed that when McRee conveyed to Chouteau he had not obtained Hertzog's title, but when we come critically to examine the deed, it will appear beyond doubt or cavil that McRee did have Hertzog's title. It is true that McRee's deed to Chouteau bears date 30 August, 1838 (see page 93), and that Henry Clay's deed to McRee and others bears date and was acknowledged 11 Oct., 1839. Now, though the deed of McRee & wife to Chouteau was dated 30 August, 1838, it was not acknowledged till the 31 day of October, 1839, just 20 days after the deed of Clay to McRee. It is elementary law that prima facie a deed takes effect and is sup-
571 posed to be delivered at the time of acknowledgement, so that when McRee's deed was delivered to Chouteau McRee had all of Hertzog's title. If the decree was not void, that carried with it all the title that Christian Wilt ever had, equitable and legal; if void, then it carried with it the entire equitable title that Hertzog had as surviving partner.

"IV. But if it be admitted that the decree in the case of Hertzog v. George W. Wilt was absolutely void, and that Christian Wilt's title remained unaffected till the decree in the suit against Wilt's heirs and Hertzog's heirs, brought by McRee in 1844, yet still we affirm that Chouteau has title under McRee by virtue of the deed of McRee to him, delivered on the Oct. 21, 1839, not by way of enurement, *by* by way of estoppel against Samuel McRee and Mary McRee and Charles Gibson taking title from Sam'l McRee.

"It is admitted that until the survey was returned to recorder of land titles in 1841 no title passed to the O'Carroll tract. What, then, was acquired by McRee by Clay's deed? Simply the New Madrid certificate No. 150—the right to locate. Having, then, that right, McRee assigns to Chouteau an interest in it for a valuable consideration. After having assigned this interest in it to Chouteau, the New Madrid certificate No. 150 is located, and the title vested for the first time on the return of the survey in 1841. Then, after the title was vested, McRee thinks he discovers that he had only acquired the equitable title to the certificate and the land, and brings his bill against the heirs of Hertzog and heirs of Wilt, and in that bill admits and grounds his petition for relief upon the following facts:

"1st. That the equitable title to the New Madrid certificate No. 150 and newly-located land was in Joseph Hertzog, as surviving partner of Christian Wilt.

572 "2d. That Henry Clay had become possessed of that equitable title.

"3d. That Henry Clay had sold it to Wm. McRee in his life-time and had been paid for it. (See page 86 and also at page 77, recital in Clay's deed.)

"William McRee, it appears from deed between his heirs at page 79, died prior to 1836.

"4th. That Clay conveyed the land and certificates so sold to and paid by William McRee to the heirs of William McRee after his death by his deed of 1839, Oct. 11th.

"5th. That in this way, and this way only, he became the owner of the equitable title to the New Madrid certificate. Now, at the time he conveyed to Chouteau McRee had the equitable title, and by the decree based upon this same equitable title he obtains the naked legal title. Can, under these circumstances, there be any doubt, however bare may have been the assignment of the interest in the New Madrid certificate or quit-claim to the land that might be or have been located thereunder, that McRee, when he obtained, under that equity which he possessed when he sold to Chouteau, the legal title, held it for Chouteau as far as Chouteau's interest went?

"McRee by this decree gets no new title. He merely perfects that which he had when he conveyed a part of his interest to Chouteau."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

Ext's fr. brief of def'ts in for rehearing, G. vs. Chouteau.—Paper marked "5" in blue pencil.

"It is assumed by the decision made in this cause that Samued McRee, when he made the deed to Chouteau in 1838, had no title to or inter-
573 est in the New Madrid location No. 150, and that Chouteau, by the deed of Wash and Devotion to him in 1822, acquired no legal or equitable title to the New Madrid certificate or the land located thereunder, and that Samuel McRee acquired by virtue of the decree in his suit against Hertzog & Wilt's heirs in 1845 for the first time the right to and title in the New Madrid certificate and newly-located land, and that having so acquired it, it did not enure to Chouteau by virtue of McRee's deed to him in 1838.

"If this is an error, then the result does not follow; and we think we can conclusively show that it is so.

"In this branch of the case all parties are agreed upon the following facts:

"1st. That all the title to the New Madrid location No. 150 was vested in Christian Wilt.

"2d. That though vested in Christian Wilt he held it only as trustee for the firm composed of himself and Hertzog; that Christian Wilt died in 1819, and that Hertzog, as surviving partner, had the title to the New Madrid certificate and any land that might be located thereunder; that

Christian Wilt left only one child, George Wilson Wilt (see deed of Hertzog to Wash and McRee), bill in chancery.

"3d. That the title to the newly-located land under New Madrid certificate No. 150 first became vested on the return of the survey to the recorder of land titles in 1841.

"It follows, then, by the admission of all parties that from the death of Christian Wilt, apart from any proceedings in court, the equitable title to this New Madrid certificate was vested in Joseph Hertzog as surviving partner, and *and* it was competent for him to sell it and any land
574 located or to be located thereunder to any other person, and that person could by filing a proper bill obtain the title from the heirs of Christian Wilt, or such title as Christian Wilt originally acquired.

"What now is the effect of the deed of Wash and Devotion to Chouteau in 1822?

I. And first upon the supposition that the proceedings and decree of 1821, in the case of Hertzog vs. Wilt, are an absolute nullity—not only erroneous but void—still Chouteau acquired whatever title Hertzog had. Hertzog, as surving partner, having the perfect right to the New Madrid location conveys it in 1822 to Robert Wash to secure a large sum of money to Devotion, which was a debt due by the firm (see pages 57–59, printed record), with authority upon default, to sell at ten days' 'public' notice. Wash on the 27 Nov., 1824, conveys this portion of the land thus conveyed to him to Chouteau, reciting that the deed was made by 'virtue of the power and authority in him vested by said deed.'

"Now, what did Chouteau acquire by that deed?

"1st. If no 'public notice' was given, he held Joseph Hertzog's title precisely as Wash held it, and has been in possession as such trustee for the last 40 years.

"2d If 'public' notice was given, and the sale and deed made thereunder, then Chouteau acquired all of Joseph Hertzog's title to that land. We say it sufficiently appears that this sale was made under the provisions of the deed of Hertzog to Wash. The deed of Wash, it is true, does not recite how it was done, does not particularize how the notice was given, whether by newspaper or posting, or in what manner, but it does state that it was made by virtue of the power and authority in him vested by said Joseph Hertzog, by a certain deed, &c., and that as it has been proved that possession was taken under it at once and from that time has been held
575 undisturbed for 40 years, it will be presumed under the recitals of that deed that the proper notice was given. (27 Mo., 352; Papin vs. Massey.) Upon any theory, then, even if decree be void, we have the legal title to whatever Joseph Hertzog owned, whether equitable or legal."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"III. If, then, this decree is not absolutely void, Chouteau acquired Hertzrog's title, even if no title was conveyed by the deed of Wash. It has been assumed that when McRee conveyed to Chouteau, he had not obtained Hertzog's title, but when we come critically to examine the deed it will appear, beyond doubt or cavil, that McRee did have Hertzog's title. It is true that McRee's deed to Chouteau bears date 30' August, 1838 (see

page 93), and that Henry Clay's deed to McRee and others bears date and was acknowledged 11' Oct., 1839. Now, though the deed of McRee & wife to Chouteau was dated 30' August, 1838, it was not acknowledged till the 31st day of October, 1839, just 20 days after the deed of Clay to McRee. It is elementary law that a deed takes effect and is supposed to be delivered at the time of acknowledgement. (Oatman vs. Walker, 33 Maine, 67; Osterhaut vs. Shoemaker, 3 Hill, 517.) A deed takes effect from its delivery, and the recording of the deed is prima facie evidence of its delivery. (2 Hillard Real Estate, p. 228, note A; Chess. vs. Chess., 1 Penn., 32.) Here the deed was filed for record November 8th, 1839, 28 days after McRee got all the title he ever had, because it was as owning the land under this deed that he brought his bill against the heirs of Wilt and Hertzog, so that when McRee's deed was delivered to Chouteau
576 McRee had all of Hertzog's title in this piece now in controversy. If the decree was not void, that carried with it all the title that Christian Wilt ever had, equitable and legal; if void, then it carried with it the entire equitable title that Hertzog had as surviving partner.

"IV. But if it be admitted that the decree in the case of Hertzog vs. George W. Wilt was absolutely void, and that Christian Wilt's title remained unaffected till the decree in the suit against Wilt's heirs and Hertzog's heirs brought by McRee in 1844, yet still we affirm that Chouteau has title under McRee by virtue of the deed of McRee to him, delivered on the 8th Nov., 1839—not by way of enurement, but by way of estoppal against Samuel McRee & Mary McRee and Charles Gibson taking the title from Samuel McRee. It is admitted that until the survey was returned to recorder of land titles in 1841 no title passed to the O'Carroll tract. What, then, was acquired by McRee by Clay's deed? Simply the New Ma'rid certificate No. 150; the right to locate.

"Having, then, the right, McRee assigns to Chouteau an interest in it for a valuable consideration.

"After having assigned this interest in it to Chouteau, the New Madrid certificate No. 150 is located and the title vested for the first time on the return of the survey in 1841. Then, after the title was vested, McRee thinks he discovers that he had only acquired the equitable title to the certificate and the land, and brings his bill against the heirs of Hertzog and heirs of Wilt, and in that bill admits and grounds his petition for relief upon the following facts:

"1st. That the equitable title to the New Madrid certificate No. 150 and newly located land was in Joseph Hertzog, as surviving partner of Christian Wilt.

"2nd. That Henry Clay had become possessed of that equitable title.

"3d. That Henry Clay had sold to William McRee in his life-
577 time, and been paid for it. (See page 86, & also at page 77, recital in Clay's deed.) William McRee, it appears from deed between his heirs at page 79, died prior to 1836.

"4th. That Clay conveyed the land and certificate so sold to and paid by William McRee to the heirs of Wm. McRee after his death, by his deed of 1839, Oct. 11th, and that the other heirs had conveyed their interest to Samuel McRee.

"5th. That in this way, and this way only, he became the owner of the equitable title to the New Madrid certificate.

"Now, at the time he conveyed to Chouteau, McRee had the equitable title, and by the decree based upon this same equitable title he obtains the naked legal title (to the certificate & location; of course the legal title, strictly speaking, was in the U. S). Under these circumstances, can there be any doubt (however may have been the assignment of the interest in the New Madrid certificate or quitclaim to the land that might be or have been located thereunder) that McRee, when he obtained the legal title through and under that equity which he possessed when he sold to Chouteau, held it for Chouteau, as far as Chouteau's interest went?

"McRee by this decree gets no new title. He merely perfects that which he had when he conveyed a part of his interest to Chouteau.

"V. Samuel McRee, and all claiming under him, are, by the averments in his bill in chancery, estopped from denying that Joseph Hertzog was the owner, as surviving partner, of the New Madrid certificate No. 150, and any land that might be located thereunder, and had a perfect title to the New Madrid certificate as to any other chose in action belonging to the partnership, and to the equities that might attach to any land by reason of such ownership.

"VI. As then, when Clay acquired Hertzog's right to New Madrid certificate No. 150 and equities, and conveyed the same to McRee,
578 and McRee conveyed a certain interest therein to Chouteau, the title to the newly-located land had not vested, and did not vest until 1841. The title of Hertzog was that of entire ownership, and it required no bill in chancery to perfect it. This equity and imperfect title is subject to sale under execution; so held in Landis vs. Brant, at page 372, as to sale under execution. So that this equity then existing and owned by Hertzog as surviving partner passed (supposing Chouteau acquired no prior title) to Clay under his execution. Then, when the United States issues the superior and conclusive evidence of the legal title by its patent, that patent relates back to the inception of the title. (Taylor vs. Brown, 5 Cranch, at p. 253; Landis vs. Brant, 10 How., at p. 375; Mitchel vs. Handfield, 33 Mo., 438.)

"So, also, in case of Shaw vs. Cooper, 7 Peters, 292, a patent issued in 1822. In 1829 it was surrendered for error, and a new one was then issued. It was held that the last patent related back to 1822. In Jackson vs. McCall, 3 Cowan, 75, A purchased premises at sheriff's sale as property of B. B died, and B's devise' broug' ejectment. After action brought, A got the deed from sheriff, and the court held that the deed related back to time of sale. (See also Boyd vs. Longworth, 11 Ohio, 352; Jackson vs. Dickinson, 15 John. R., 309; Jackson vs. Raymond, 1 John. C., 85; Alexander vs. Merry, 9 Mo., 524.)

"1st. The title, as between the United States and the owner of the New Madrid certificate, became vested in the holder of the New Madrid certificate at the time of the filing the survey of the land located thereunder in the office of the recorder of land titles. (Bagnall vs. Broderick, 13 Peters, 448; Barry vs. Gamble, 3 How., 51; Lesween vs. Price, 12 How., 74; Givens vs. Gray, 26 Mo., 300.) So affirmed in the decision given in the case.

"2d. Since 1825 ejectment would lie in the State courts in favor of a plaintiff claiming under a New Madrid location, the survey
579 of which had been so returned. (See acts of 1825, p. 234–'5, and subsequent acts.) The Supreme Court of the United States recog-

nizes the validity of the laws of Missouri giving owners of inchoate titles the right to sue in ejectment. (Maguire vs. Tyler, 1 Black., p. 202; Holme vs. Fenn, 21 How., at p. 488."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of he court.)

"The decision in Fenn vs. Holme, at page 488, declares only that because 'the patent is the superior and conclusive evidence of the legal title in the courts of the United States the action of ejectment cannot be maintained without the patent.'"

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

Ex'ts fr. Gibson's brief in G. vs. Chouteau, in relation & equitable title & on rehearing.—Paper marked "6" in blue pencil.

"As to the question of relation:

"The plaintiff admits that the legal title will relate or enure to such equitable title and such only as is recognized by the Federal courts & the laws of the United States, and that w'ere several acts are necessary to the completion of a title, the last act (as for instance a patent) will be made to relate to the first, so as to protect the title against an intervening adverse title (here there is no adverse title); but he denies emphatically that any case can be found where the legal title is made to relate or enure to one who has no title, & is a mere intruder. One legitimate act is related to another, two or more parts are put together. Chouteau has no part of the title, legal or equitable."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court
580 overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"The defendant now argues that the deed of Wash, trustee, to Chouteau was valid to pass the title or interest, whatever it was, conveyed to Wash in trust by Hertzog, and also that the deed of McRee & wife to Chouteau passed the equity acquired by Samuel McRee by the last decree in 1848, and also that Mrs. Mary McRee & her vendee are estopped by the deed to Chouteau & and the last decree in chancery. The plaintiff was informed of the intention to reargue these questions for the first time after the argument on rehearing begun.

"On the last day of the last term the plaintiff was informed by the chief justice, verbally, in open court, that the rehearing was granted on two questions only; that is, the effect of the first decree in chancery against Wilt's heirs, and, second, the statute of limitation; and was referred to the order in writing granting the rehearing.

"The order granting the rehearing confines the rehearing terms to 'this subject of the statute of limitations, & also upon the effect of the first decree in chancery to pass the title of the heir of Christian Wilt, on which there may be some room for doubt."

"1. The order granting the rehearing being thus specifically confined

to two questions only, the plaintiff humbly suggests that it would be unfair to require him on the spur of the moment to argue these questions; and he further humbly suggests that the defendant has, in obtaining this rehearing on any of these questions when the same had been fully argued on the part of defendant by four able lawyers in three several briefs, already obtained an advantage not asked by other suitors in this court, & to extend this rehearing to points other than those reserved is going to' far. It must be apparent to the court that this case is but one chapter in a long litigation commenced by Chouteau on a case without "the
581 semblance of justice" and "on a technical point" (24 Mo., 133), & he is in no condition to ask such extraordinary favors.

"2. The rehearing being asked in several points, & being granted on two questions only, it must, of cou'se stand as having overruled the motions as to the points not reserved for reargument.

"3. Protesting against being compelled to go into these questions at all, the plaintiff now states what occurs to him now as reasons against the positions assumed.

"1. The plaintiff's action is an action at law. The plaintiff does not appeal to equity. The defendant appeals to equity. The transaction between Wash and Chouteau must be regarded in equity *in equity* utterly immoral & void—malum in se.

"A power to sell a horse or a certificate of any kind must be pursued substantially, & a private sale without notice under a power to sell only at public auction & on public notice (as Hertzog's deed required), whether the property be real or personal, is absolutely void in equity.

"2. The legal title to the land was then in the Government, & this transaction was therefore, ex necessitate, in equity.

"3–4. The transaction does not become valid by time, for time cannot be counted against the plaintiff for the reasons stated above.

"5. The decree of 1848 was acquired by Samuel McRee at his own expense & for his own benefit. It was based on the idea that the first decree was a pure nullity. He did not act for Chouteau's benefit, nor was he bound by any relations to Chouteau. That his deed did not convey any after-acquired title is no longer a disputable question. It is therefore immaterial how he got the after-acquired title, whether by conveyance, or decree, or inheritance.

"6. The recitals in the deed & decree as to the bargain with Will-
582 iam McRee were fully discussed in the first argument, as will appear by all the briefs, but were considered insufficient to prove any interest in the locus in quo in William McRee."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"9. The defendants' counsel claim that the certificate attached to no land until the survey was returned in 1841, and was therefore personal property. Then McRee could have had no interest in the land when the deed was made. The deed purports to convey only the land. It does not purport to assign the certificate, consequently nothing could pass by the deed, & as the after-acquired title did not pass it was merely null.

"The parties in the testimonium aver that the deed was made on the day after its date.

"In it was decided that a deed without an acknowledgement was valid inter parties, & consequently where, as in this case, the word 'whereof' relates to the date as well as other parts of the deed, that must be considered the time when the deed was made & delivered. It might be, & deeds frequently are, acknowledged many years after their date and delivery."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

Ex'ts fr. brief of Glover & Shepley, for def'ts, in G. vs. Chouteau" Sup. Ct. U. S.—Paper marked "7" in blue pencil.

"2d. If the several acts of location, viz, the New Madrid warrant, the survey, and patent certificate, had any vitality and value, they did not belong to Mary McRee, but to Mr. Chouteau; and if they could be perfected into a title, that could only be done for the benefit of the honest
583 and lawful owner. So far as the land in dispute is concerned, Pierre Chouteau was the owner of it and of the New Madrid certificate covering it. It was his title that was patented, and the patent related back to the date of the location, and must be considered as dated then.

"It was his interest in said certificate that was surrendered and taken up at the land department when the patent issued. The whole consideration received by Government for said patent, so far as the land in controversy is concerned, moved from Chouteau. Mary McRee surrendered nothing; had nothing to surrender. The plaintiff contends that certificate No. 150 and S. No. 2498 were void as against the United States when the patent issued. Concede it. Still they did not belong to Mary McRee; they could not enure to her; they were the property of Mr. Chouteau, and if for them the land has been patented the benefit must enure to him. The case is simply that where one seeking to purchase land for himself pays all the money, and by some mistake, accident, or trick the deed is made to another against his will.

"3d. The conveyance, beginning with that of O'Carroll to Ruddle and ending with that of McRee & wife to Chouteau, vested in Chouteau an equitable claim to the certificate No. 150 and the location under it by S. 2498, as has been repeatedly decided by the supreme court of Missouri and by the Supreme Court of the United States. See. 21 How. U. S., 481, where this identical location was held to be an equitable title."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

584 "The questions in these last-mentioned cases were: (1.) Whether a party could interpose his equity between the Government and its patentee. (2.) Whether the decisions of officers of the land department were conclusive on all persons, and even the Government, till judicially vacated. And it was held they were not conclusive, but the equitable rights of parties cut off by issueing a patent or other official acts would be set

up. The case in 1 Peters, 212, was that of a claim against the Government of Spain, assumed under treaty by United States. The claim was allowed by commissioners at the suit of A, and the money was paid to him. Held: The allowance only established the validity of the claim, but not the ownership of A and that B might recover the money from A by proving his right to it. (See 21 Howard U. S.; 2945 Cranch R., 59.

"Mary McRee had no claim to the land in dispute prior to her patent. She did not get her patent on a void entry; she got it on no entry at all. The patent, so far as she was concerned, was a grant without a single preliminary step to acquire land under any law of the United States. Her patent was her first title paper; of course she had no previous equity to rest upon. Chouteau had the only equities which the Government was to recognize or reject. The Government have, by issuing a patent to Mary McRee as assignee and legal representative of O'Carroll, recognized fully the claim of Chouteau as the consideration of the patent, and in equity the patent is his to the extent of the land in dispute."

585 (The plaintiffs objected to reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"7th. If the patent merely conveyed the legal title, leavlng Chouteau's equities outstanding, the plaintiff was not entitled to recover. No plaintiff can recover on a New Madrid title on a bare legal title. The plaintiff must have the best equitable title also, or he has no standing in court.

"In 1839 the case of Bagnall vs. Broderick was heard and decided. (13 Peters, 436.) In that case Robertson, who had owned the claim, sold and conveyed it. Eleven years afterwards he took a patent on the same claim, and this patent was set up against Robertson's vendue. A majority of the judges held that in an ejectment in a Federal court the patent must prevail. (13 Peters, 450.) Justice McLean dissented, insisting the fraud could be shown in the ejectment. Id., p. 451 to 458, inclusive. See his opinion.) All the judges were of the opinion that on the chancery side of the court the rights of Bagnall, the equitable owner of the location under Robertson's deed, could be set up; that is, that the vendee of Robertson was honestly entitled to the land.

"What was to be done? All the title papers in New Madrid cases were to some one or his legal representatives.

"The legislature of Missouri determined to open the door to equitable titles in these cases, so they passed an act declaring—

586 "(1.) That in a New Madrid case a patent should be only prima facie evidence in an ejectment of title in its grantee.

"(2.) That the title to the land located by a New Madrid certificate should be determined in an ejectment according to the equitable rights of parties. (Session acts, 1838–'9, §§ 2 and 3.) The revision of 1845 copied p. 442, §§ 12 and 13. In 1849 the new code of practice was adopted abolishing distinctions of pleading in respect to law and equity. In 1855 the revision omitted the word 'equitable,' but again declared a patent only prima facie evidence in an ejectment, and provided the suit should 'be determined according to the rights of the parties to the land,' meaning of course to recognize other rights than those of the patentee. By virtue of this statute in actions of ejectment concerning New Madrid locations a court of law has the same powers as a court of equity. (10 Mo. R., 260.)

"II. Whatever title Christian Wilt had to the New Madrid location was, so far as the land in controversy is concerned, vested in Pierre Chouteau, either by deed of Wash to him or deed of Chouteau to him. In this branch of the case the following may be assumed to be admitted facts:

"*a.* That all the title to the New Madrid location No. 150 was vested in Christian Wilt.

"*b.* That though vested in Christian Wilt he held it only as trustee for the firm composed of himself and Hertzog; that Christian Wilt died in 1819, and that Hertzog, as surviving partner, had the title to the New Madrid certificate and any land that might be located thereunder; that Christian Wilt left only one child, George Wilson Wilt. (See deed of Hertzog to Wash and McRee's bill in chancery.)

"*c.* That the title to the newly located land under New Madrid certificate No. 150 first became vested on the return of the survey to the recorder of land titles in 1841. It follows, then, by the admission of
587 all parties, that from the death of Christain Wilt, apart from any proceedings in court, the equitable title to this New Madrid certificate was vested in Joseph Hertzog as surviving partner, and it was competent for him to sell it, or any land located thereunder, to any other person, and that person could, by filing a proper bill, obtain the title from the heirs of Christian Wilt, or such title as Christian Wilt originally *required*.

"1st. The effect of the deed of Wash and Devotion to Chouteau, in 1862, was to vest in Chouteau whatever title to the land in controversy Hertzog had.

(2) (1)

"Upon the supposition that the decree and proceedings of 1821 in the case of Hertzog vs. Wilt are an absolute nullity, not only erroneous but void, still Chouteau acquired whatever title Hertzog had. Hertzog, as surviving partner, having the perfect right to the New Madrid location, conveys it in 1822 to Robert Wash to secure a large sum of money to Devotion, which was a debt due by the firm (see page , printed record), with authority, upon default, to sell at ten days' 'public' notice. Wash, on the 27th November, 1824, conveys this portion of the land thus conveyed to him to Chouteau, reciting that the deed was made 'by virtue' of the power and authority in him vested by said deed.

"Now, what did Chouteau acquire by that deed?

"*a.* If no 'public' notice was given he held Joseph Hertzog's title precisely as Wash held it, and has been in possession as such trustee for the last 40 years.

"*b.* If 'public' notice was given, and the sale and deed made thereunder, then Chouteau acquired all of Joseph Hertzog's title to that land. We say it sufficiently appears that this sale was made under the provisions of the deed of Hertzog to Wash. The deed of Wash, it is true, does not recite how it was done, does not particularize how the notice was
588 given, whether by newspaper or posting, or in what manner, but it does state that it was made 'by virtue of the power and authority in him vested by said Joseph Hertzog by a certain deed,' &c., and that, as it has been proved that possession was taken under it at once and from that time has been held undisturbed for 40 years, it will be presumed, under the recitals of that deed, that the proper notice was given. (27 Mo., 452, Rapin vs. Massey.)

"Upon any theory, then, even if decree be void, we have the legal title to whatever Joseph Hertzog owned, whether equitable or legal."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"3d. If, then, this decree is not absolutely void, Chouteau by McRee's deed to him acquired Hertzog's title, even if no title was conveyed by the deed of Wash.

"It is assumed by the plaintiff that when McRee conveyed to Chouteau he had not obtained Hertzog's title. When we come critically to examine the deed it will appear, beyond doubt or cavil, that McRee did have Hertzog's title. It is true that McRee's deed to Chouteau bears date 30th August, 1838 (see page), and that Henry Clay's deed to McRee and others bears date and was acknowledged 11th October, 1839. Now, though the deed of McRee and wife to Chouteau was dated 30th August, 1838, it was not acknowledged till the 31st day of October, 1839, just 20 days after the deed of Clay to McRee. It is elementary law that prima facie a deed takes effect and is supposed to be delivered at the time of acknowledgement. (Otman vs. Walker, 33 Maine R., 67; Osterhaut vs. Shoemaker, 3 Hill, 517.) A deed takes effect from its delivery, and the
589 recording of the deed is prima facie evidence of its delivery. (2 Hilliard's Real Estate, page 282, note *a*; Chase vs. Chase, 1 Penn., 32.) Here the deed was filed for record November 5th, 1839, 28 days after McRee got all the title he ever had, because it was owning the land under this deed, and only under this deed, that he brought his bill against the heirs of Wilt and Hertzog.

"So that when McRee's deed was delivered to Chouteau McRee had all of Hertzog's title in this piece now in controversy that he ever had. If the decree was not void, that carried with it all the title that Christian Wilt had, equitable and legal; if void, then it carried with it the entire equitable title that Hertzog had as surviving partner

4th. As then, when Clay acquired Hertzog's right to New Madrid certificate No. 150 and its equities, and conveyed the same to McRee, and McRee conveyed a certain interest to Chouteau, the title to the newly located land had not vested, and did not vest till 1841. The title thus acquired of Hertzog *of Hertzog* was that of entire ownership, and it required no bill in chancery to perfect it. This equity and imperfect title was subject to sale under execution. So held in Landis vs. Brant, at page 372, as to sale under execution.

"So that this equity then existing and owned by Hertzog as surviving partner passed (supposing Chouteau acquired no prior title) to Clay under his execution. Then when the United States issues the superior and conclusive evidence of the legal title by its patent, that title relates back to the inception of title. (Taylor vs. Brown, 5 Cranch, at page 253; Landis vs. Brant, at page 373, 10 How.; Mitchell vs. Handfield, 33, Mo., 438.) So also, in case of Shaw vs. Cooper, 7 Peters, 272. A patent issued in 1822; in 1829 it was surrendered for error and a new one was then issued.
590 It was held that this last patent had relation back to 1822.

"In Jackson vs. McCall, 3 Cowen, 75, A purchased premises at sheriff's sale as property of B; B died, and B's devisee brought ejectment. After action brought A got the deed from sheriff and the court held the deed

related back to time of sale. (See also Boyd vs. Longworth, 11 Ohio, 352; Jackson vs. Dickenson, 1 John. C., 85; Alexander vs. Merry, 9 Mo., 524.)

"5th. But if it be admitted that the decree in the case of Hertzog vs. George W. Wilt was absolutely void, and that Christian Wilt's title remained unaffected till the decree in the suit against Wilt's heirs and Hertzog's heirs brought by McRee in 1844, yet still we affirm that Chouteau has title under McRee by virtue of the deed of McRee to him delivered on the 8th November, 1839—not by way of enurement, but by way of estoppel against Samuel McRee and Mary McRee and Charles Gibson taking title from Samuel McRee. It is admitted that until the survey was returned to the recorder of land titles, in 1841, no title passed to the O'Carroll tract.

"What, then, was acquired by McRee by Clay's deed? Simply the New Madrid certificate No. 150, the right to locate. Having then that right, McRee assigns to Chouteau an interest in it for a valuable consideration. After having assigned this interest in it to Chouteau the New Madrid certificate No. 150 is located, and the title vested for the first time on the return of the survey in 1841. Then, after the title was vested, McRee thinks he discovers that he had only acquired the equitable title to the certificate and the land, and brings his bill against the heirs of Hertzog and heirs of Wilt, and in that bill admits, and grounds his petition for relief upon, the following facts:

591 "First. That the equitable title to the New Madrid certificate No. 150, and newly located land, was in Joseph Hertzog, as surviving partner of Christian Wilt.

"Second. That Henry Clay had become possessed of that equitable title.

"Third. That Henry Clay had sold it to Wm. McRee in his life-time, and been paid for it (see page , and also at page , recital in Clay's deed). Wm. McRee, it appears from deed between his heirs, at page , died prior to 1836.

"Fourth. That Clay conveyed the land and certificate, he sold to, and paid by Wm. McRee, after his death, by his deed of 1839, Oct. 11th, and that the other heirs of Wm. McRee had conveyed their interest to Samuel McRee.

"Fifth. That in this way, and in this way only, he became the owner of the equitable title to the New Madrid certificate.

"Now, at the time he conveyed to Chouteau, McRee had the equitable title, and by the decree based upon this same equitable title he obtains the naked legal title. Under these circumstances can there be any doubt (however may have been the assignment of the interest in the New Madrid certificate or quit-claim to the land that might be or have been located thereunder) that McRee, when he obtained the legal title through and under that equity which he possessed when he sold to Chouteau, held it for Chouteau as far as Chouteau's interest went?

"McRee by this decree gets no new title. He merely perfects that which he had when he conveyed a part of his interest to Chouteau, and gets it only by averring and proving that he held a complete equitable title to the land when he conveyed to Chouteau.

"6th. Samuel McRee and all claiming under him are by the averments in his bill in chancery estopped from denying that Joseph Hertzog was

the owner, as surviving partner, of the New Madrid certificate No.
592 150, and any land that might be located thereunder, and have a perfect title to the New Madrid certificate or to any other chose in action belonging to the partnership, and to equities that might attach to any land by reason of such ownership.

"If, therefore, Samuel McRee, at the time he conveyed to Chouteau, which was after he had obtained all the title he ever had to this land, as before shown, had and owned the New Madrid location, he, by his deed to Chouteau, conveyed to Chouteau an equitable interest in the New Madrid location to the extent of the land described in his deed to Chouteau, and Chouteau was the assignee of the New Madrid location to that extent."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"3rd. In Missouri there is no longer any distinction between law and equity. No one can recover in an ejectment merely by virtue of a legal title.

"As this court is now re-examining the case as it came from the State court, it must give effect to the rights of parties as they exist or are affected by the practice of the State courts. This State practice forbids a recovery by the plaintiff, provided the defendant really has the equitable title to the land. The cause must be decided here as it ought to have been decided in the State court.

"In the State courts of Missouri an equitable title to land under laws of the United States is superior to the legal title under the same laws; that is, there is neither law nor equity, but only the right which is recognized by the practice of Missouri.

"4th. The survey having been returned in 1841, and Chouteau having taken possession, prior to that time, of this land under a recorded
593 deed, and having had possession ever since under it, down to the commencement of this suit in 1862, adverse to plaintiff and those under whom he claims, the action of plaintiff is barred. Lindell vs. Cabanne, 12 Mo., 184; Givens vs. Gray, 26 Mo., 300; Clemens vs. Runkel, 34 Mo., 41; Bryant & Rouse vs. Forsyth, 19 How., 334.

"The statute of limitations had extinguished the equity of Mary McRee before the patent was issued to her. Whatever equity she had passed to Chouteau by virtue of the statute.

"This court has never held that a patent *as* a new title to the patentee at its date. The court has always held that the patent enures to the owner of the claim in virtue of which it issued. This court has always conceded the power and duty of the State courts to decide controversies arising between adverse claimants of inchoate equitable titles emanating from the Government prior to the patent. But if such actions may be brought at all prior to patent in State courts, the power to fix the time in which they shall be brought is inherent. And a right lost by adverse possession under the statute, is as much lost as if the claimant had conveyed by deed. A grant presumed by lapse of time is as good as a grant proven by a conveyance.

"The simple question is, had McRee to alien her right to this

New Madrid warrant prior to patent. If she could have aliened her right so as to lose the benefit of the patent thereafter issued to her, then the mode of alienation is not material. It may be by deed, or it may be by a possession which under a law of the State has ripened into a title just as effectual and as perfect as if made by deed. Biddle vs. Mellon, 13 Mo., 335. The case of Givens vs. Gray is admitted to be decisive of this case unless it be overruled, and the plaintiff holds that the case of Holme vs. Ferm, 21 Howard, 488, is entirely antagonistic to that decision and overrules it.

594 "This does not in the least affect this question. It is simply a question as to the form of action."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then & there excepted to the ruling of the court.)

"In the decision in Fenn vs. Holme, at page 488, declares only that because 'the patent is the superior and conclusive evidence of the legal title in the courts of the United States,' the action of ejectment cannot be maintained without the patent."

(The plaintiffs objected to the reading of this extract in evidence
595 on the ground that the same was irrelevant and incompetent. The court overruled the whole objection, and plaintiffs then and there excepted to the ruling of the court.)

Ext's fr. brief of B. A. Hill, in G. vs. Chouteau, Sup. C't U. S.—Paper marked "S" in blue pencil.

"5th. The statutes of Missouri declare that in all actions of ejectment in said State 'the title to the land located by virtue of such New Madrid certificate of patent shall be determined according to the rights of the parties to the land as located by virtue thereof' (sec. 11).

"'The real owner of the title shall prevail, and the patent, to whomsoever issued, shall only be prima facie evidence of the title of the patentee.' (Sec. 12, Rev. Code, 1855, Title Ejectment, p. 692, Rev. Code of 1845, and Laws of 1839, in pari materia.

"These laws were enacted by the general assembly of Missouri to meet the hardship of the technical rule laid down in Bagnell vs. Broderick (13 Peters, 445, 1839), and to prevent circuity of action, or an appeal to a court of equity. The location and patent in that case were to John Robertson, jr., for the newly located lands, and the title to the New Madrid lands injured by earthquakes was in Morgan Byrne, and the statutes of Missouri merely providing for an action of ejectment on a New Madrid location, it was held by this court that Byrne must resort to a court of equity in order to get the benefit of the patent (13 Peters, 450). But by these late enactments of the general assembly of Missouri the patent is only prima facie evidence of the title of the patentee, and the patent shall enure to the benefit of the real party in interest, the real owner of the land injured by earthquakes, and the real owner
596 of the land located in lieu thereof, according to the rights of the parties.

"These enactments have changed the practice in Missouri in ejectment

suits by permitting every kind of equitable title to be inquired into in actions on locations or patents under the New Madrid act, and the party showing the better right to the location or patent may recover or defend in ejectment, and is not driven into equity to assert his right or title. In 1849 a code was adopted in the State of Missouri abolishing all distinctions between law and equity, and that code as revised and amended has ever since continued in force. This suit was tried under that code, and the defendant was found to have the title to the sixty-four acres sued for as part of the location by force of the relation of the patent to the date of the patent certificate, which was issued 16th August, 1841, after the return of the United States survey to the recorder of land titles, and an adverse possession of more than twenty years from that day. The plaintiff insists that when Samuel McRee, his grantor, made a deed in 1838 to 'bargain, sell, release, quitclaim, and convey to Pierre Chouteau, jr., and his heirs,' the sixty-four acres sued for as part of the O'Carroll location, McRee did not hold the title by reason of want of service of process in a suit in equity in 1821, avoiding the decree through which he claimed title. It will not be denied that if McRee had held a deed or a decree for the inception equity to the New Madrid claim in 1838, when he made the deed to Chouteau, the patent of 1862 would have related back so
597 as to have passed the legal title to Pierre Chouteau, in August, 1841, for the sixty-four acres conveyed to him, and there would have been no occasion to invoke the relation of the patent to James Y. O'Carroll, and the bar of the statute of his limitation as against his title."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and the plaintiffs then and there excepted to the ruling of court.)

" Whatever right, claim, or equity Sam. McRee had in 1838 or in 1848 passed to Chouteau by force of his possession. Equitable claims and rights pass in Missouri as well as legal titles by force of the adverse possession for the period fixed by the statute of limitations. In 1847 the period of limitations in suits for real estate was fixed at ten years, and the same rule has existed from time to time. The equitable title of McRee was barred by limitation after he acquired all the equitable interests by the decree in 1848, and all the interest of McRee in law or equity was thereby vested in Chouteau for the land so possessed adversely for the period fixed by the statute. (McNair vs. Lot, 34 Mo., 303; Clemens vs. Bunkle, 34 Mo., 43, and cases cited; Biddle vs. Mellon, 13 Mo., 340; Jackson vs. Oltz, 8 Wend., 440; Jackson vs. Horden, 4 I. R., 210; Cholmondeley vs. Clinton, 2, Joc. & Walk., 191.)"

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

598 " The deed of Samuel McRee and Mary, his wife, to Pierre Chouteau, jr., though dated the 30th of August, 1838, was not acknowledged and delivered until the 31st of October, 1839, twenty days after the deed of Henry Clay & wife to the McRee's was dated and acknowledged. (Record, pp. 58 and 70.)"

(The plaintiffs objected to the reading of this extract in evidence, on the

ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"It further appears that Henry Clay, executor of Morrison, on the 10th day of March, 1833 (Record, p. 56), had vested in him by a decree of a court of equity, in St. Louis County, all the titles to the heirs of Hertzog and Wilt, being the parties then having an interest in the O'Carroll location by reason of the decree of 1821 being void; so that in fact all the interest in the O'Carroll location was vested in Henry Clay, executor of Morrison, on the 10th of May, 1883, and all the interests of Henry Clay, executor as aforesaid, was vested in Wm. McRee in 1836, by force of the relation of the deed of 1839 to the contract of 1836, and all the equitable interest that existed in the New Madrid location of O'Carroll was vested in Samuel McRee in 1838, when he dated the deed of himself and wife to Pierre Chouteau for the land in suit, which was acknowledged and delivered on the 31st of October, 1839, twenty days after Samuel McRee held all the equitable rights and titles that existed by force of the deed and said decree of 1833.

599 "If proper weight had been given to these considerations in the court below the equitable title to the land in suit would have been held by the court to have vested in P. Chouteau, jr., in 1839, and that the legal title, by force of the relation of the patent to the date of exchange and location, became vested in Mr. Chouteau on the 14th of August, 1841, for the land in suit.

"In this view of the case the doctrine of relation and the operation of the statute of limitations, either under the relation or on the equitable title, need not be invoked, and the defendants would stand before the court as holding the title to the land in suit by a deed for it from the grantor and devisor of Mary McRee, through whom plaintiff claims title.

"7th. The deed of Samuel McRee and wife to Pierre Chouteau, delivered 31st October, 1839, conveyed all the interest, legal and equitable, that existed in favor of O'Carroll or Wilt or Henry Clay prior to the return of the survey in August, 1841. On the 31st October, 1839, the deed of McRee and wife to Chouteau took effect without regard to its date. (Rev. Code of Missouri, 1835, Title Conveyances; Osterhaus vs. Schumaker, 3 Hill, 517; Outman vs. Walker, 33 Maine R., 67; 2 Hilliard R. prop., p. 282; Chase vs. Chase, 1 Penn., 32.)

"On the 31st October, 1839, Samuel McRee owned all the interest, right, and title in the New Madrid location or equitable claim, and his bill in equity of 1844, to cure the irregularity in the old decree of 1821, did not enlarge or effect his equitable interest in the New Madrid location;

600 it merely prevented the alleged irregularity from effecting the equitable title or interest he had already acquired on the 4th of July, 1836, and on the 11th of October, 1839. (Record, pp. 58, 59.) Samuel McRee was therefore competent to convey and assign his equitable interest to Pierre Chouteau, jr., for the land described in the deed delivered on the 31st October, 1839, as part of the O'Carroll location, and the proceedings of McRee in 1844 to cure prior irregularities and affirm his equitable title of 1836 will be presumed to have been for the benefit of his grantee and assignee, Chouteau, then and for a long time before and ever since in possession of the locus in quo as his and devisee's coterminous

proprietor by division fences with improvements far more valuable than the land in 1839. (Rev. Code Mo., 1845; Title Conveyances, Ejectment, Limitations; Papin vs. Massey, 27 Mo., 452.) In determining who has the better equity in this case the deed of Samuel McRee, delivered 31st October, 1839, to Chouteau is conclusive against his devisee as to all equities then vested in McRee. He then had all equities, claims, and rights to the New Madrid location that existed, and his bill in equity of 1844 is a solemn admission of record, binding on his devisee, that he was the owner of all the said equities, claims, and rights in 1836 and in 1839. (Record, pp. 61 to 69.)

"8th. The patent of 10th June, 1862, to Mary McRee, assignee of J. Y. O'Carroll, by deraignment of title, does not vest any new title in her as Mary McRee, but vests the old original title under the New Madrid
601 location, and she takes as devisee of Samuel McRee and not otherwise. (New Madrid Act, sec. 3815.) The patent must issue on the patent certificate according to law, and if any such operation can be given to the patent as plaintiff claims for it it would be void. (Stoddard vs. Chambers, 2 How., U. S., 285; Cunningham vs. Ashley, 14 How., U. S., 377; Easton vs. Salisbury, 21 How., 426; Bissell vs. Penrose, 8 How., 317, 344; Lafayette's heirs vs. Kenton, 18 How., 197; Strother vs. Lucas, 12 Peters, 410; Landers vs. Brant, 10 How., ; Storrs vs. Stork, 6 Wallace, 417, 418; Rector vs. Ashley, 6 Wallace, 182.)

"A bold attempt has been made by plaintiff to manipulate the land offices and land officers, so as to cut off all the equities preceding the date of the patent in 1862. So far as the surveyor general and recorder of land titles at St. Louis, the Commissioner of the General Land Office, and Secretary of the Interior at Washington, in 1862, are concerned, the plaintiff used them as wax in his hands, and the obvious design of all the proceedings was to set aside the location of 1841, and make a new one of 1862, so as to commence the title as of the date of the patent. All that stands in the way of this official iniquity is the act of Congress of 1815 and this court. If the plaintiff has succeeded in this maneuvre, and the original location of 1841 has been lawfully annulled, then the patent is void under the authorities above cited; but he has failed because his proceedings were to' late, and the law compels the title to pass to O'Carroll and his legal representatives, and to Mary McRee as the legal representative of O'Carroll, and the original location must be upheld by the court in order to give effect to the act of Congress and prevent the destruction of a meritorious title by the malfeasance of public officers, and the
602 maneuvres of this plaintiff.

"By the old patent certificate of 1841, and the new patent certificate of 1862, it is disclosed 'that James Y. O'Carroll or his legal representatives is entitled to receive a patent.' The patent certificate of 1841 directed the patent to issue on survey No. 2489; the supplementary certificate of 1862 directs the patent to issue on survey No. 2498, but in both certificates the order is to issue the patent to O'Carroll or his legal representatives, as required by the act of Congress of 17th February, 1815. (Sec. 1 and 3, vol. 1, Pub. Land Laws and Inst., p. 255, '6.) The act gave no discretion to the Commissioner, but required him to issue the patent to James Y. O'Carroll or his legal representatives, according to the long established custom of the office."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"The evidence is conclusive that Mary McRee had no other claim, right, title, or equity when the patent issued, except as the legal representative of James Y. O'Carroll, under the will of Sam. McRee, who had conveyed to Pierre Chouteau; and this court will hold that the title by the patent vested in Mary McRee, as the legal representative of O'Carroll, in strict accordance with the patent certificate of 1841, and that such patent related back to the patent certificate and passed title to James Y. O'Carroll and his legal representatives, on the 16th August, 1841. (See cases under the third point, and also Witherspoon vs. Duncan, 4 Wallace, 218; Storke vs. Storrs, 6 Wallace, supra, 418.)

603 "9th. The annullment of survey 2498 is a singular blunder if the plaintiff intended to have survey 2498 annulled. As it appears of record, the two surveys 2489 of 1841 and 2498 of 1862 represent precisely the same survey of the O'Carroll location with the same lines, excepting only survey No. 3183 for Cottard, within a survey for Mottard, which does not create any new interference with the O'Carroll survey. The plaintiff in his anxiety to get a new survey and annul the old one has procured the surveyor-general to annul the new one of 1862, which left the old survey of 1841 in full force when the patent issued. (Record, pp. 76, 74, and map marked page 98; p. 16, and map marked p. 20.)

"To make sure work the plaintiff procured Nelson, the recorder of land titles at St. Louis, to annual the patent certificate of 1841 as issued on survey No. 2498. This act was in December, 1862, six months after the issue of the patent on the identical survey 2498 (record, p. 16, and map marked "page 20)," which Nelson and the surveyor-general had decided to be annulled. On the 9th of January, 1863, the Commissioner declares the patent certificate of 1841 issued on survey 2498 to be annulled, and the Secretary of the Interior on the 2nd of March, 1863, affirmed the decision (record, pp. 77, 78). All of these orders and decisions of the recorder, Commissioner, and Secretary are after the issue, delivery, and recording of the patent, and after the plaintiff brought suit in this case against the defendant for the land, and are for that reason null and void, and without any effect. (Lott vs. Prudhomme, 3 Rob. La., 293; 13 Lon. Ann. R., 128; United States vs. Stone, 2 Wallace, 535.)

"The powers attempted to be exercised by these executive officers over a patent sealed, issued, and delivered only exists in courts of justice
604 having jurisdiction in the premises. (Id.) All these acts are mere nullities.

"10th. The patent certificate of 1841 remained in force, and the second certificate of 1862 did not effect the original certificate. The return of the survey before the 16th August, 1841, to the recorder operated as an exchange and perfected the title of the New Madrid location in O'Carroll or his legal representatives, and the patent was a mere form, and related back to the survey and patent certificate of 1841. (See cases above cited, and Bryan vs. Forsyth, 19 How., 337, '8; Dredge vs. Forsyth, 2 Black,

569; Witherspoon vs. Duncan, 4 Wall., 218; Carroll vs. Safford, 3 How., 462; Stock vs. Storrs, 6 Wallace, 417, 418; Taylor vs. Brown, 5 Cranch, 253; Mitchell vs. Handfield, 33 Mo., 438; Slon vs. Cooper, 7 Peters, 272; Jackson vs. McCall, 3 Cowen, 75; Alexander vs. Merry, 9 Mo., 524.)"

(Plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

Exts. fr. b'f Glover & S., pr'p for resp. in G. vs. Chouteau, adj'd T. Sup. Ct. U. S. in fall of 1871.

"14th. In 1839 Samuel McRee, having then all the equitable right he ever had, by the deed of himself and wife, acknowledged on the 31st October, 1839, conveyed to Pierre Chouteau for the consideration of one hundred and fifty dollars, therein acknowledged to have been paid him, the land now in controversy without any covenant of warranty. Deed recorded November 8, 1839. (Record, pp. 61, 62.)"

(The plaintiff objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"16th. In 1844 Samuel McRee filed his bill in equity against the
605 heirs of Wilt and Hertzog, reciting the proceedings in the suit of Hertzog vs. Wilt, and the facts as exhibited by the bill in that case and the acquirement of the title by him under the several conveyances above named, and none others, and stating that he was advised that the decree was not valid; that by virtue of these conveyances he unquestionably had the equitable title, and asking a decree vesting their title in him; and on the 30th June, 1848, a decree was rendered in his favor for the whole tract of six hundred and forty acres located under the New Madrid certificate No. 150. (Record, pp. 53 to 60.)"

(The plaintiffs objected to reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"Here, then, are not two titles, but only one, and the question is, By the laws of the State of Missouri who owns that title, so far as it covers this land?"

(The plaintiff objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"The Supreme Court of the United States recognizes the validity of the laws of Missouri giving owners of inchoate titles the right to sue in ejectment. (Maguire vs. Taylor, 1 Black, 202; Holmes vs. Fenn, 21 How., 488; Bryan et al. vs. Forsyth, 19 How., at p. 336.)

"3rd. In Missouri, under the laws of the State, no plaintiff can recover on a New Madrid title on a bare legal title. The plaintiff must have the best equitable title also, or he has no standing in court. In 1839 the case

of Bagnell vs. Broderick was heard and decided. (13 Peters, 436.)
606 In that case Robertson, who had owned the claim, sold and conveyed it. Eleven years afterward he took a patent on the same claim, and this patent was set up against Robertson's vendee. A majority of the judges held that in an ejectment in a Federal court the patent must prevail. (13 Peters, 450.) Justice McLean dissented, insisting the fraud could be shown in the ejectment. (Id., 451 to 458 inclusive; see his opinion.) All the judges were of opinion that on the chancery side of the court the rights of Bagnell, the equitable owner of the location under Robertson's deed, could be set up; that is, that the vendee of Robertson was honestly entitled to the land.

"What was to be done? All the title papers in New Madrid cases were to some one or his legal representatives. The legislature of Missouri determined to open the door to equitable titles in these cases. So they passed an act declaring:

"1. That in a New Madrid case a patent should be only prima facie evidence in an ejectment of title in its grantee.

"2nd. That the title to the land located by a New Madrid certificate should be determined in an ejectment according to the equitable rights of parties. (Session acts 1838, '39, secs. 2 and 3.) The revision of 1845 copied pages 442, sections 12 and 13. In 1849 the new code of practice was adopted abolishing distinctions of pleading in respect to law and equity. In 1855 the revision omitted the word 'equitable,' but again declared a patent only prima facie evidence in an ejectment, and provided the suit should 'be determined according to the rights of the parties to the land,' meaning of course to recognize other rights than those of the pat-
607 entee. By virtue of this statute, in actions of ejectment concerning New Madrid locations, a court of law has the same powers as a court of equity. (10 Mo. R., 260.)

"As this court is now re-examining the case as it came from the State court, it must give effect to the rights of parties as they exist or are affected by the practice of the State courts.

"This State practice forbids a recovery by the plaintiff, provided the defendant really has the equitable title to the land. The cause must be decided here as it ought to have been decided in the State court.

"In the State courts of Missouri an equitable title to land under the laws of the United States is superior to the legal title under the same laws—that is, as to New Madrid locations, there is neither law nor equity, but only the right which is recognized by the practice in Missouri."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"It is contended by the plaintiff in error that these decisions are antagonistic to decisions of this court in the cases of Holme vs. Fenn (12 How., 48) and of Maguire vs. Tyler et al. (8 Wall, 665). The case of Holme vs. Fenn does not in the least affect this question. It is simply a question as to the form of action. At page 448 the court says: 'A practice has prevailed in some of the States (and among them the State of Missouri) of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their char-

acter; but this practice, as was so explicitly ruled in Bennett vs.
608 Butterworth (11 How.), can in nowise affect the jurisdiction of the courts of the United States, who, both by the Constitution and the acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principals of decisions appropriate to each.

"That is, upon either a confirmation of the first board of commissioners or a confirmation under the act of 1816, or holding under a New Madrid certificate, surveyed and returned to the recorder of land titles (as the act under which these respective titles emanated provided for the issuing of a patent), until that conclusive evidence of title issue the common-law action of ejectment would not lie."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"2nd. But if it (the patent) be good as far as the land is concerned, she holds it for us; for—

(*a*) "If the several acts of location, viz, the New Madrid warrant, the survey, and patent certificate, had any vitality and value, they did not belong to Mary McRee, but to Mr. Chouteau; and if they could be perfected into a title, that could only be done for the benefit of the honest and lawful owner. So far as the land in dispute is concerned, Pierre Chouteau was the owner of it and the New Madrid certificate covering it. It was his title that was patented, and the patent related back to the date of the location, and must be considered as dated then. It was his interest in said certificate that was surrendered and taken up at the land depart-
609 ment when the patent issued. The whole consideration received by Government for said patent, so far as the land in controversy is concerned, moved from Chouteau. Mary McRee surrendered nothing, had nothing to surrender. The plaintiff contends that certificate No. 150 and S. No. 2498 were void as against the United States when the patent issued. Concede it. Still they did not belong to Mary McRee; they could not enure to her; they were the property of Mr. Chouteau, and if for them the land has been patented the benefit must enure to him. The case is simply that where one seeking to purchase land for himself pays all the money, and by some mistake, accident, or trick the deed is made to another against his will."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiff' then and there excepted to the ruling of the court.)

(*c*) "When one person holds an equitable title to the land, and another, by fraud, accident, or mistake, against the will of the equitable owner, contrives to get the legal title in himself, a court of equity will divest that title, and will hold it to be inferior to the equitable title." "There are some things so essential to the nature of the grant (of the legal title) that the great principles of justice and law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which and elder title was acquired may be examined. (8 Mo. R., p. 94.) If a patent has been procured by any fraud or trust, equity will relieve. (7 Mo. R., p. 610.) But is only after

610 the patent has issued to the wrong party that the court will act, for till then the legal title is not in the power of the court. (9 Mo. R., p. 189.) After the legal title has passed out of the Government, a court of equity will investigate the conduct of the land officers, and any concealment of papers without authority, or other wrong done will be redressed. (9 Mo. R., 323-'4-'5-'6; 11 Mo. R., pp. 586 to 592.)

"Nor will these officers be allowed illegally to divest parties of their rights. (9 Mo. R., p. 573.) Any title papers unfairly obtained will be corrected in equity. (12 Mo. R., 333; 36 Mo. R., p. 187-193; 18 How. U. S., 87.) Where a person originally entitled to a bounty from Government assigned it to another, and afterwards took a patent himself, it was held to belong to his assignee by relation. (21 How. U. S., 228.) The confirmation of a claim perfects the same as a title against the Government, but leaves it to its original value when placed in opposition to the rights of another person, (11 Martin R., 212; 24 Mo. R., 132-'3.) Where several parties claim title to property with which a special tribunal may deal as between one party and the Government and disregard the rights of others, the latter may come into the ordinary courts of justice and litigate their claims. (20 How. U. S., p. 8; 1 Peters, 212; 9 How. U. S., 328; 14 How. U. S., 377; 18 How. U. S., 44.)

"The questions in these last-mentioned cases were: (1) whether a party could interpose his equity between the Government and its patentee; (2) whether the decisions of officers of the land department were conclusive on all persons, and even the Government, till judicially vacated; 611 and it was held they were not conclusive, but the equitable rights of parties cut off by issuing a patent, or other official acts, would be set up. The case in 1 Peters, 212, was that of a claim against the Government of Spain assumed under treaty by United States. The claim was allowed by commissioners at the suit of A, and the money was paid to him. Held: The allowance only established the validity of the claim, but not the ownership of A, and that B might recover the money from A by proving his right to it. (See 21 How. U. S., 294; 5 Cranch R., 59.) Mary McRee had no claim to the land in dispute prior to her patent. She did not get her patent on a void entry; she got it on no entry at all. The patent, so far as she was concerned, was a grant without a single preliminary step to acquire land under any law of the United States. Her patent was her first title paper; of course she had no previous equity to rest upon. Chouteau had the only equities which the Government was to recognize or reject. The Government have, by issuing a patent to McRee as assignee and legal representative of O'Carroll, recognized fully the claim of Chouteau as the consideration of the patent, and in equity the patent is his to the extent of the land in dispute.

"Whenever the United States issues the superior and conclusive evidence of the legal title by its patent that patent relates back to the inception of the title. (See cases cited as to this relation under the second point; also the following: Taylor vs. Brown, 5 Cranch, at page 253; Lands 612 vs. Brant, at page 373, 10 How.; Mitchell vs. Handfield, 33 Mo., 438.) So also in the case of Shaw v. Cooper, 7 Pet., 272. A patent issued in 1822; in 1829 it was surrendered for error, and a new one was then issued. It was held that this last patent had relation back to 1822. In Jackson vs. McCall (3 Cowen, 75) A purchased premises at sheriff's

sale as property of B. B died, and B's devisee brought ejectment. After action brought A got the deed from sheriff, and the court held the deed related back to time of sale."

(The plaintiff objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"V. The supreme court of Missouri, in deciding that our defence rested alone upon a title conferred upon us by the statute of limitations, committed an error. Upon this branch of the case it is not so much that we complain of the decision of that court that the deed of McRee to Chouteau, acknowledged and declared on the 31st October, 1839, was a mere quit-claim deed, and could pass no right to the land subsequently acquired by McRee, as to the application of the principal. Samuel McRee acquired no new title after that conveyance, in any proper acceptation of the term. If, then, we concede that the right still remained, in 1839, in Wilt's heirs and Hertzog's heirs, and till the decree in the case of McRee against them, still we insist that Chouteau had title under McRee by virtue of the deed of McRee to him, acknowledged on the 31st October, 1839, and de-
613 livered 8' November, 1839—not by way of enurement, but by way of estoppel against Samuel McRee, Mary McRee, and Charles Gibson taking title under Samuel McRee. It is admitted that until the survey was returned to the recorder of land titles in 1841 no title passed to the O'Carroll tract. What, then, was acquired by McRee by Clay's deed? Simply the New Madrid certificate No. 150—the right to locate. Having then that right McRee assigns to Chouteau an interest in it for valuable consideration. After having assigned his interest in it to Chouteau the New Madrid certificate No. 150 is located, and the title vested for the first time *and* the return of the survey in 1841. Then, after the title was vested, McRee thinks he discovers that he had only acquired the equitable title to the certificate and the land, and brings his bill against the heirs of Hertzog and heirs of Wilt, and in that bill admits, and grounds his petition for relief upon, the following facts:

"First. That the equitable title to the New Madrid certificate No. 150 and newly located land was in Joseph Hertzog as surviving partner of Christian Wilt.

"Second. That Henry Clay had become possessed of that equitable title.

"Third. That Henry Clay had sold it to William McRee in his lifetime and been paid for it (see page page 56, and also at page 54, recital in Clay's deed). William McRee, it appears from deed between his heirs at page 52, died prior to 1836.

"Fourth. That Clay conveyed the land and certificate so sold to and paid by William McRee after his death by his deed of 1839, October 11th, and that the other heirs of William McRee had conveyed their interest to Samuel McRee.

614 "Fifth. That in this way, and this way only, he became the owner of the equitable title to the New Madrid certificate.

"Now, at the time he conveyed to Chouteau, McRee had the equitable right, and by the decree based upon this same equitable title he obtains the naked legal right. Under these circumstances can there be any doubt (however may have been the assignment of the interest in the New Madrid

certificate or quitclaim to the land that might be or have been located thereunder) that McRee, when he obtained the legal title through and under that equity which he possessed when he sold to Chouteau, held it for Chouteau as far as Chouteau's interest went?

"McRee by this decree gets no new title. He merely perfects that which he had when he conveyed a part of his interest to Chouteau, and gets it only by aver'ing and proving that he held a complete equitable right to the land when he conveyed to Chouteau. Samuel McRee and all claiming under him are by the averments in his bill in chancery estopped from denying that Joseph Hertzog was the owner as surviving partner of the New Madrid certificate, or to any other chose in action belonging to the partnership, and to equities that might attach to any land by reason of such ownership.

"If therefore Samuel McRee at the time he conveyed to Chouteau (which was after he had obtained all the title he ever had to this land as before shown) had and owned the New Madrid location, he by his deed to Chouteau conveyed to Chouteau an equitable interest in the New Madrid location to the extent of the land described in his deed to Chouteau,
615 and Chouteau was the assignee of the New Madrid location to that extent. He therefore perfected the same title he conveyed to Chouteau for himself and Chouteau, and so understood it, as is proved by his acquiescing in Chouteau's possession till his death, and of Mary McRee acquiescing after his death, until a controversy sprang up, not with Pierre Chouteau, but with the children of Pierre Chouteau as part of the heirs of Charles Gratiot in reference to another tract of land. It may be asserted that because the deed of McRee to Chouteau bears date before the date of Clay's deed to McRee, he had not Clay's title when he conveyed to Chouteau. To this there are two answers:

"1st. That though dated before, yet it was acknowledged twenty days after the deed of Clay to McRee.

"It is elementary law that, prima facie, a deed takes effect at the time of its acknowledgement. (Oatman v. Walker, 33 Maine R., 67; Osterhaus v. Schomaker, 3 Hill, 517.) A deed is presumed to be delivered when recorded. (2 Hilliard Real Property, p. 282, n. *a;* Chase v. Chase, 1 Penn., 32.)

"2nd. Clay's deed recites the sale to William McRee in his life-time, and payment of the purchase-money, which was prior to 1836. Clay's deed relates back to this sale. (1 Johns., chap. 81; 3 Caines, 261; 2 Johns. R., 520; 4 Johns., 234; 10 How., 573.)

"Though we regard the decision of the supreme court of Missouri, as to the effect of the deed of McRee to Chouteau, as to passing an after-acquired title, and as to the effect of the original decree, as erroneous, yet, however true it may be, the principle is misapplied, and does not reach the case here."

(The plaintiff objected to the reading of this extract in evidence
616 on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

Ext's fr' b'f of McPherson in G. vs. Chouteau, U. S. S. Ct.—Paper marked "10" in blue pencil.—Notes for reply to Glover and Shepley.

"Notes for reply to Glover and Shepley.

"It is claimed for defendant that the possession of Chouteau operates as a grant of the equitable title by the laws of Missouri.

"In the first place, the State has no power to pass such an act, and none such has been passed.

"Second. Its courts have made no such decision. The point was made in the first hearing below, and held against the defendant. In the second opinion it is held that the remedy is extinguished, but the right is not conveyed. (39 Mo., p. 587.)

"Third. If the possession prior to the issuing of the patent would operate as a grant, or presumption of a grant, of the equitable title, and the legal title by patent be made enure to it, this would be in effect to bar and pass away the title indirectly, when it could not be done directly. If the plaintiff was not bound to sue on the equitable title under the statute of the State giving an ejectment on it, no presumptions can be made against him. He is guilty of no laches or default. If the equitable title can be transferred by presumption of a grant by mere time, it is clear that the maxim that the statute of limitation does not commence to run until the patent issues is a barren fiction, for it could be of no avail in any case where it is needed.

"The defendant's counsel puts the question (assuming that Clay had obtained the title to the certificate): 'What, then, was acquired by McRee by Clay's deed?' 'Simply the New Madrid certificate No. 150—the
617 right to locate.' (Glover and Shepley, p. 9.) In Rector vs. Ashley (6 Wall.) it was admitted that Rector had done all he was required to do in order to appropriate the land to his location certificate prior to any act on the part of the State of Arkansas, and it was insisted that he had thus acquired a right which could not be defeated, and that the subsequent approval of the recorder would relate to his incipient claim and cut out the intervening title. This court held that he acquired no right to the land by his own act; that his right or interest could only take its birth from the act of the Government through its agent, who was the recorder. If he had had, prior to such approval, any interest or claim whatever to which relation could be made, anything to "tie to," it is clear that the judgement of this court would have been the very reverse of what it was. Therefore no one had any interest in this land prior to the 16th of August, 1841, and the only question can be whether McRee's deed could pass the interest subsequently acquired. (Hale vs. Cain, 19 Ark.; Rector vs. Ashe, 20 Ark.)

"The decree in Hertzog vs. Wilt (p. 45), the deed of Hertzog to Wash (p. 48), the deed of Wash to Chouteau (p. 57), the sheriff's sale to Clay (pp. 53–'4–'5), the judgment in Clay vs. Hertzog (p. 56), the deed of McRee to Chouteau (p. 70), the deed of Clay to McRee (p. 58), were one and all prior to the approval of the location by the recorder of land titles in 1841; each and all of these documents are quitclaims and do not pass an after-acquired interest, and therefore, the decision below, that no one acquired Wilt's title until the decree of 1848 was made, was correct.

618 "As neither Clay nor McRee had then any interest whatever in the land, and owned 'simply the New Madrid certificate No. 150—the right to locate;' and as McRee's deed to Chouteau was a naked quitclaim conveying his interest in the land only, and not in the certificate, nothing could pass by it. The decision of the supreme court below was full and emphatic on this point. (39 Mo., 569, 586; Rector vs. Ashley, 20 Arkansas and 6 Wall.)

"This point is decisive of defendants claim to the equitable title."

(The plaintiffs objected to this reading of this extraction in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"As to McRee's deed to Chouteau:

"When there is no proof as to the time of delivery of a deed it is 'elementary law' that it takes effect from the day of its date, and not from the time of its acknowledgement, if that be on a different day. (Shep. Touchstone, 72.) It is laid down as 'elementary law' that all deeds do take effect from, and therefore have relation to, the time not of their date but of their delivery, and this is always presumed to be the time of their date, unless the contrary do appear.

"See to the same effect: Best on Presumptions, sec. 389; Breckenridge vs. Todd, 3 Monroe, 52; Owen vs. Owen, 5 Humph., 354; Roots vs. Holliday, 6 Minn., 258; Morgan vs. Whitemore, 6 Exc., 716; Wood vs. Owings, 1 Cranch, 251.

"Again, the defendants contend that deeds are to be presumed to be delivered at the time when recorded. I admit this proposition because it is fatal to the defendant's title, for the deed from McRee to Chou-
619 teau, was recorded November 8, 1839, and the deed from Clay to McRee was not recorded until June 2nd, 1840—seven months afterwards. It is therefore certain that if neither the date or the recording of the deed is to prevail, *Mr.* Ree's title incepted after his deed to Chouteau, even admitting that Mr. Clay had obtained the equitable title. No reason is or can be given why a deed should take effect from its acknowledgement.

"In Wood vs. Owings, 1 Cranch, 251, this court held that a deed does not take effect from its acknowledgement. Clay's deed to McRee did not relate to the deed of Ann McRee and al, in 1836, because if William McRee had paid the money for this land, which does not appear, no memorandum in writing was made or signed by either party; the sale was a pure nullity, and he had at best a mere right to recover back the purchase-money, but no claim or anything that could ever, even in equity, be ripened into a claim to the land. This was, therefore, no step in the transfer of the title. It bears no analogy to Landes vs. Brant, for there the patent was related to the first step in the title. It does not appear that the money was paid for this land. It might have been on any other account. The successor of Samuel McRee is not estopped from denying the averments in the bill filed by him in 1844. (Deery vs. Cray, 5 Wall., 795.)

"It is not sufficient for the defendants to show that McRee was merely estopped to deny the statement in this bill. They must go further and prove that the estoppel is such as to transfer the titles to themselves, and his bill certainly does not operate as a transfer of title to Chouteau. The

plaintiff claims under the patent. The bill is no part of his claim of title.

620 "But assuming that all the facts stated in the bill are true, still Samuel McRee had no title prior to 1848, when the decree was made, for it the property descended in equity to Hertzog as surviving partner, then the sheriff's sale to Mr. Clay was void, for the execution, notice of sale, and the sheriff's deed all purport to sell, not the interest of Hertzog as surviving partner, but his individual interest only. (Record, pp. 53–'4–'5.)

"The firm is stated to be insolvent, and if the property belonged to it then it would, on the defendant's theory, go to the creditors of the firm, and neither Wilt or Hertzog had any interest in it individually. This sale was in invitum, and transfers no greater or other interest than the documents purport to convey, and cannot be aided in equity. (Moreau vs. Duchmendy, 18 Mo., 522.)

"Taking all the facts stated in the bill and exhibits as true, still Samuel McRee had no equitable claim. The decree, therefore, was the inception of his title, and gives him a new title, for without the decree he had no title nor anything upon which to base his complaint in equity."

(The plaintiffs objected to the reading of this extract in evidence on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"As to Chouteau's title under Wash: Hemstead's deed as guardian was made to Hertzog as surviving partner. (Record, p. 39.) Hertzog's deed of trust to Wash conveys his individual title only, and to secure his

621 individual debt (Record, p. 48), and therefore it passed nothing. The deed to Wash was made 'in consideration of the mutual trust and confidence reposed in the said R. Wash, who is charged and entrusted with the collection of said debt in the way of his profession, as the attorney at law of the said Devotion,' the beneficiary. (Record, p. 43.) He could not, therefore, transfer his trust estate. His deed to Chouteau shows on its face that he supposed he had authority to convey the title by his deed alone. It does not recite that any notice had been given, or that a sale was made at public auction or in conformity with the power. Lapse of time can raise no presumption against a patent. Wash could not convey the legal title, for it was not in him, and such a conveyance in equity is void. There is no room for any presumption, for we have the deed itself. If the deed did convey the estate held by Wash to Chouteau, then Chouteau entered as trustee, and still continues to hold as such."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

Exts fr. Gibson's br'f on mo. to affirm, G. vs. Chouteau, s. c't Mo.—Paper marked "11" in blue pencil.

"Motion to affirm. Gibson vs. Chouteau.

"The appellee files herewith the opinion and mandate of the Supreme Court of the United States reversing the judgement rendered by this court

against him on the question of limitation, at the October term, 1869, and remanding the cause to this court; and all other questions herein being held and determined in his favor, and nothing being now open for consideration, he prays this court to affirm the judgement of the St. Louis land court herein rendered.

622 "C. GIBSON."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"IV. The defendants in presenting their claim to the equitable title as a defence under our statutes are to be treated precisely as if they had filed a separate and independent bill in chancery. (Opinion of Supreme Court U. S. herewith filed.)

"When the judgement against them on their equity cases was rendered at the October term, 1866, and especially after that judgement as to that part of the case was expressly affirmed at the March term, 1867, and the same correctly entered nunc pro tunc at the October term, 1869, so stating on its face, as they took no exceptions during the term, their equity case became res adjudicata, and the judgement so rendered is a perpetual bar. (Glover & Shepley's brief, filed March term, 1869; Maguire vs. Tyler, 40 Mo.)

"Suppose A brings an ejectment, B files an independent bill in chancery; a nisi prius court consolidates and tries both cases together--gives judgment against defendant in both. Defendent moves for a new trial on the law case only, and says in the motion, if it is granted, he will not ask the court to consider his equity case again. The motion is granted—the case continued to the next term for trial on the law case. The term lapses. Can the court reopen the equity case at the next term?

623 Will this court do what it refuses to permit inferior courts to do in the alteration of its records? These decisions have remained as the unquestioned law of this State and the rule of property therein for six years past. Where any objection is made or ever intended to be made to any action of a nisi prius court, exception must be taken at the time, and motions for new trials must be made in a few days, usually four. Will parties be allowed to question the opinions of this court six years afterwards, or to reargue them without a rehearing duly granted? When causes are reversed and remanded and again come into this court, it is the universal rule not to allow debate on the questions settled in the first opinion.

"Should this suit reopen the judgement of affirmance, overturn the two opinions rendered, and reverse and remand this cause, and it should be again brought here six years afterwards, as it in that case might be, would it be in order for plaintiff before a new bench to disregard its opinions and to reargue those questions de novo? If so, when is this case to be ended?

"When a case has been decided in this court only such questions will be noticed as were not determined in the previous decision; whatever was passed upon will be deemed res adjudicata and no longer open to dispute or further controversy. (Overall vs. Ellis, 38 Mo., 209.")

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court

overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

624 *Ext's fr. Glover's b'f on mo. to affirm, 1872, G. vs. Chouteau, s. c't.—Paper marked "12" in blue pencil.*

"The case stands here without a judgement to be heard on the same assignment of errors on which it stood when it had not been argued, aided by the opinion of the Supreme Court of the United States."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

"It is immaterial when or how these questions are discussed. The action of ejectment never concludes any question of title. (Adams Ejectment, top page 389, 4th ed.)

"By judgment in ejectment plaintiff's lessor obtains possession of the lands recovered by the verdict, but does not acquire any title except that which he previously had. (4 Mansfield, 382, Chapman vs. Armistad; 1 Watts, 330, Mercer vs. Watson; 3 Harrington, 489, Hawkins vs. Hayes.)

"A judgement in ejectment was never regarded as conclusive until an act of the legislature was passed to make it so. (1 R. S., 1855, p. 695, sec. 33.) This act remained in force only about two years, when it was repealed. (See act adjourned session, 1857, p. 34; also 32 Mo. R., p. 176, Slevin, Tr., vs., Brown.) In reply to so much of the argument as contends that the case is not open, it would be competent for this court to even grant an amendment the defendants, provided they could see that it would subserve the ends of justice. This court so exercised its discretion. (8 Howard, 586, Kennedy vs. Georgia.) There is nothing in the nature of an appellate court proceeding according to the common law which forbids
625 amendments. In 20 Mo., 545, Keetan vs. Keetan, a judgement was reversed by an act of discretion in the court, which judgement was legally rendered in order to prevent a manifest injustice. In 21 Mo., 65, Boyle vs. Hardy, this court reversed a judgement merely to enable a party to amend. (9 Wheaton, 576; Walker vs Craig, 37 N. York, 521.)

"There is no need of any application for rehearing, because there is no judgement here now against us. The case is now open, and stands for judgement, and of course for hearing on the record and assignment of errors."

(The plaintiffs objected to the reading of this extract in evidence, on the ground that the same was irrelevant and incompetent. The court overruled the objection, and plaintiffs then and there excepted to the ruling of the court.)

(For opinion of Supreme Court U. S., in case No. 73, Gibson vs. Chouteau et al., delivered at Dec. term, 1871, see pp. 257–266 of this transcript.)

(For opinion of supreme court Mo., in case Gibson vs. Chouteau et al., delivered at March term, 1872, see p. 268 of this transcript.)

The plaintiffs in rebut'al read the testimony of John R. Shepley, as pre-

served at p. 66 of the printed record, as follows: (See pp. 214, 215 of this transcript). And this was all the evidence in the case on either side.

The case was then argued by counsel.

And afterwards, at the October term, 1877, the court dismissed the plaintiff's petition, and gave judge' for the defendant.

626 The plaintiffs immediately filed a motion for a rehearing in the words and figures following, to wit:

Motion for rehearing.

In the St. Louis circuit court. In equity.

CHARLES CHOUTEAU & JULIA MAFFITT
vs.
CHARLES GIBSON.

The plaintiffs pray the court here to grant them a rehearing of the above-entitled cause, and to set aside the judgement & decree in the same rendered, and to give them judgement and a decree according to the prayer of their petition for the following reasons:

1. Because the matter and things shown in and by the said petition, and proved by the evidence adduced at the hearing, entitle the plaintiffs to the relief in their petition asked for.

2nd. Because the matters and things set up by way of answer & defence are unsustained and disproved by the evidence, and insufficient in law to deprive plaintiffs of their rights to the relief prayed in their petition.

3rd. Because the matter set up in said answer as res judicata was not in fact adjudged in any former case between the said parties or their legal representatives.

4th. Because upon the whole case made by the petition and reply and the evidence adduced the complainants are entitled to the decree of this court awarding to them the relief prayed in their petition.

627 5th. Because the decree of the court is for the defendant, whereas it should, according to equity and law, be for the plaintiffs.

CHARLES P. CHOUTEAU,
By GLOVER AND SHEPLEY.
JULIA MAFFITT,
By THOS. T. GANTT.

The court overruled the said motion, and plaintiffs immediately excepted to said ruling and presented this bill of exceptions, and prayed that it be signed and made part of the record; which is done accordingly.

JAMES J. LINDLEY, *Judge.*

Affidavit for appeal.

STATE OF MISSOURI,
County of St. Louis, ss:

Personally, on this 28th day of November, in open court, appears William C. Maffit, agent of the plaintiffs and appellants, and, being duly sworn, makes oath and says that the appeal prayed for in the above-entitled cause

is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgement or decision of the court.

W. C. MAFFIT.

Sworn to and subscribed before me this 28th day of November, A. D. 1877.

J. FRED. THORNTON, *Clk.*

Appeal bond.

Know all men by these presents that we, William Maffitt, as
628 principal, and Joseph H. Sheets and Thomas T. Gantt, as sureties, are held and firmly bound unto Charles Gibson in the sum of one thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at St. Louis, this twenty-eighth day of November, A. D. 1877.

The condition of the above obligation is such that whereas Charles P. Chouteau and Julia Maffit have appealed from the judgement rendered against them and in favor of Charles Gibson in the circuit court of St. Louis County, dismissing their bill of complaint with costs: Now, if said appellants shall prosecute their appeal with due diligence to a decision in the St. Louis court of appeals, and shall perform such judgement as shall be given by the St. Louis court of appeals, or such as the St. Louis court of appeals may direct the circuit court of St. Louis County to give, and, if the judgement thereof be affirmed, will comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against them by the St. Louis court of appeals, then this obligation to be void; otherwise to remain in full force and effect.

W. C. MAFFIT. [SEAL.]
J. H. SHEETS. [SEAL.]
THOS. T. GANTT. [SEAL.]

Approved in open court this 28th day of Nov., A. D. 1877.
Attest:

J. FRED. THORNTON, *Clerk.*

629 *Clerk's certificate.*

STATE OF MISSOURI,
City of St. Louis, ss:

I, J. Fred. Thornton, clerk of the circuit court, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 21st day of January, A. D. 1878.

[SEAL.] J. FRED. THORNTON, *Clerk.*

And afterwards, at the October term, 1877, of the Saint Louis court of

appeals, to wit, on the 2nd day of March, 1878, an assignment of errors was filed in said cause in words and figures as follows, to wit:

In the St. Louis court of appeals, March term, 1878.

CHARLES P. CHOUTEAU, JULIA MEFFIT, appellants,
vs.
CHARLES GIBSON, RESPONDENT.

Assignment of error.

And now come the said appellants and say, that in the record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said appellants assign the following, to wit:

1. That said court admitted improper and illegal testimony offered by respondent.

5th. That the decree was against the evidence.

6. That the decree was against law.

630 7. That the decree was against both law and evidence, and against the law under the evidence.

8. That the decree was against the weight of evidence.

9. That the judgment was rendered in favor of the respondent when it should have been rendered for the appellants; that said court overruled the motion for a rehearing made by appellants.

GLOVER & SHEPLEY & THOS. T. GANTT,
For Appellants.

And now comes the respondent, and for joinder in error says there is no error in the record and proceedings of said circuit court in said cause assigned by said plaintiff.

C. GIBSON.

And afterwards, at the March term, A. D. 1879, of the said court, the following judgment was rendered in said cause, to wit:

Judgment.

TUESDAY, *March 11th*, 1879.

CHARLES P. CHOUTEAU AND JULIA MAFFIT, appellants,
vs.
CHARLES GIBSON, RESPONDENT.
Appeal from St. Louis circuit court.

Now again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis circuit court be in all things affirmed and stand in full force and effect, and that the said respondent recover of the said

631 appellants his costs and charges herein expended and have execution therefor.

Opinion filed.

Which opinion is in words and figures following, to wit:

Opinion of the court.

CHARLES P. CHOUTEAU ET AL., APP., *vs.* CHARLES GIBSON, RESP. } Appeal from St. Louis circuit court.

OPINION OF THE COURT.

This is a proceeding in equity whereby plaintiffs seek the removal of an alleged cloud upon their title to real estate. The land involved in the controversy is a tract of sixty-four acres in U. S. survey No. 2498, part of which is the subject of a suit in ejectment, wherein the present defendant is plaintiff and the present plaintiffs are defendants. The complaint in this case is a counterpart of the defence in that. The grounds upon which equitable relief is herein sought are the same whereon defendants in the ejectment suit resist the plaintiffs' legal title under a U. S. patent issued to Mary MacRee as assignee of James Y. O'Carroll by derangment of title. In the opinion delivered by this court, at the present term, in the ejectment case, the defendant's claim' to equitable interposition are fully considered, and reference is here made to that opinion for our views of the case made by the present plaintiffs.

The circuit court upon a hearing of the proofs dismissed the plaintiffs' bill.

632 For the reasons which appear in the opinion just referred to (Gibson vs. Chouteau et al., Mo. app.) the judgment of the circuit court is affirmed.

All the judges concur.

EDW'D A. LEWIS.

Opinion in case Chas. Gibson vs. Chas. P. Chouteau.

CHARLES GIBSON, P. E., *vs.* CHARLES P. CHOUTEAU ET AL., D. E. } Error to St. Louis circuit court.

OPINION OF THE COURT.

This controversy has undergone various mutations and migrations through different forms and different forums during the past sixteen years. In September, 1862, the plaintiff, Charles Gibson, commenced a suit in the St. Louis land court against the defendant, Charles P. Chouteau and others, to recover possession of a tract of sixty-four acres, which included the twenty-four acres of land sued for in the present proceeding. Gibson obtained judgment, from which Chouteau appealed to the supreme court. In 1866 the supreme court affirmed the judgment of the land court, but afterwards sustained the defendants' motion for a rehearing chiefly on the defence of limitation. Upon the reargument in 1867 the court adhered to its former views as to all other defences, but reversed the judgment by reason of the statute of limitations. (39 Mo. Rep., 536.)

The case was then taken by Gibson to the Supreme Court of the United

States. That court found in the record no sufficient showing
633 that the Missouri tribunal had determined the cause upon any question of Federal jurisprudence, and dismissed the appeal. (8 Wall. 316.) Subsequently, at the October term, 1869, Gibson moved in the supreme court of Missouri for a correction of its records, so that the grounds of its decision against him might clearly appear.

The motion was sustained and entries nunc pro tunc were made, whereby it was shown that the decision was based exclusively on the statute of limitations as an effectual defence, notwithstanding the fact that the U. S. patent under which the plaintiff claimed was issued within ten years before the commencement of the suit. (45 Mo. Rep., 171.)

The cause was again taken to the Federal Supreme Court, where the Missouri judgment was reversed on the ground that no limitation law could operate against a title while it yet remained in the Government. (13 Wall., 102.) Afterwards, in the Missouri supreme court, at the March term, 1872, Gibson moved for a final judgment in his favor. The motion was sustained, with a proviso or condition that Gibson should enter a remittitur as to certain interfering surveys which covered part of the land in dispute. (50 Mo. Rep., 85.)

These surveys were specifically described in the record entry of the judgment. The remittitur was entered accordingly. The present suit is for land covered by the interfering surveys. The judgment below was for
defendants. It does not seem to be claimed for the defendants
634 that the plaintiff is barred in this proceedings by the record of his remittitur. Such a claim, indeed, could hardly be reconciled with the defence on which they chiefly rely. They revive the equitable defences unsuccessfully urged in the former suit, and insist that as that was only a possessory action, as well as for other reasons, there is no res judicata in the premises. The plaintiff, on the other hand, contends that all the equitable defences are barred by the former adjudication, while he holds that the remittitur only places him, as to the lands affected by it, where he would have been if they had never been involved in the suit. If the defendants are right, the subject-matter of the remittitur must be, no less than the other matters in dispute, open to further litigation. It may not follow, however, that the plaintiff's claim of res judicata, as to all questions of title or ownership, if sustained, will operate a bar against any latter assertion by him of title in the lands covered by the remittitur. If we treat the judgment as conclusive there may seem to be a repugnancy in permitting the plaintiff to sue a second time for what he has surrendered as a condition of the determination in his favor. A retraxit would, of course, conclude him. In that form of entry, "the plaintiff voluntarily abandons his cause, and goes farther; he admits that he has no cause of
action." (Pinner vs. Edwards, 6 Rand., 675.) But the entry in
635 the present case makes no such admission. It amounts simply to "an agreement not to proceed farther in that suit" as to the particular cause of action. Such an entry is no bar against another suit. (Minor vs. B'k, 1 Pet., 74.) The recovery in the former suit was based upon a U. S. patent for survey No. 2498, containing 640 acres, including the 64 acres sued for, which was issued June 10, 1862, to Mary MacRee, as assignee in right of James Y. O'Carroll, in virtue of deraignment of

title. The patent contained a list of interfering claims, numbered from 1 to 7, inclusive, followed by a reservation in these words: "Hereby expressly excepting and excluding from the transfer by these presents such valid rights as may exist in virtue of the claims particularly designated under the 1st, 2nd, 3rd, 4th, 5th, and 6th heads in the foregoing, and further saving and excepting from the transfer by these presents of any other valid adverse claims, should such exist, to any part of the land embraced in the aforesaid survey number two thousand four hundred and ninety-eight."

The 7th in the list of interfering claims is thus described: "7th survey, No. 3309, Calve, a lot of 2 by 40 arpens in the Cul-de-Sac Prairie common field. There is no evidence of this claim being confirmed." The patent proceeds: "The foregoing interferences, excluding that with survey No. 3309, contain 379.72 acres. To the residue of survey No. 2498, containing actually 291.45 acres, so far as the records of this office show, there is no valid claim." This language appears to have been copied from a public record, and adopted into the patent. It seems distinctly
636 to exclude the Calve survey from the reservation, and to incorporate it with the "residue" of survey 2498, against which "there is no valid claim." This Calve survey is nevertheless included among the interferences covered by the plaintiff's remittitur, and embraces part of the land in controversy in the present suit.

A good deal of testimony tended to show that the Calve survey No. 3309 was without validity for any purpose. The original concession to Joseph Calve, dated April 30, 1768, was for two by forty arpens in Grand Prairie. The minutes of Recorder Bates, under date December 31, 1813, locate the claim in "Big Prairie Fields," which was but another name for the Grand Prairie. The memorandum of confirmation by the same officer, made prior to July 1, 1814, notes the claim thus: "80 arpens to be surveyed, F. 153, field of St. Louis, B. Prairie." That survey No. 3309 could not be the true survey of this confirmation was evidenced by the following facts: It located the land in the Cul-de-Sac common field. The survey was never approved. On the contrary, as appears from a letter from the Commissioner of the General Land Office, dated April 18, 1874, an application for its approval was by that officer refused. He states, from evidence furnished by official papers, that "survey No. 3309 has never been approved, but, on the contrary, it was considered to be null and void for want of confirmation." He adds, in effect, that this opinion seems to have been acquiesced in and adopted by the Gen-
637 eral Land officer in the issuing of the MacRee patent for survey No. 2498. He also refers to another survey, No. 1583, of the Calve confirmation, which correctly located the land in the Grand Prairie common fields, and which was regularly approved by the proper authority. A duly certified plat and description of this survey, showing that it was approved by the surveyor-general May 15, 1845, was introduced in testimony by the plaintiff.

It thus appears that there was a strong array of testimony tending to show that the Calve survey, No. 3309, was not properly included in the plaintiff's remittitur under either the terms of the patent or those of the opinion of the Supreme Court. We have already intimated, however, that in our view the plaintiff is not by reason of the remittitur precluded

from maintaining in this proceeding his original right, if any he had, in the lands remitted; but as to all the designated interferences other than the Calve survey the patent itself is conclusively against him.

Plaintiff prayed the court, sitting as a jury, to declare the law to be that the Clave claim was not excepted from the grant by the patent, and that if the decision of the Commissioner rejecting the survey No. 3309 was genuine, the title shown by the plaintiff to the same premises was superior to any shown by the defendant thereto. Also that the plaintiff's remittitur in the former action was no bar to this if the land re-
638 mitted was easily devisable from the land recovered. Also that the location by a U. S. survey of the Calve confirmation in the Grand Prairie common field was a bar to another survey of the same confirmation in a different place. These declarations of law were refused, and it was declared for the defendants in effect that there was prima facie evidence of the validity of the Calve survey, No. 3309, as of a confirmation by the act of June 13, 1812, and that there being no countervailing evidence the plaintiff could not recover any land within said survey No. 3309. The court thereupon gave judgment for the defendants.

These rulings were clearly erroneous. It has never been supposed that a survey made by a deputy surveyor had any authoritative or official validity until approved by the surveyor-general of the proper district. On the contrary, the approval of a survey, either by that officer or by the Commissioner of the General Land Office, on appeal or otherwise, has always been treated as an elementary condition necessary to its efficacy, even as prima facie evidence of a true location. (Carondelet vs. St. Louis, 25 Mo., 464; Nemord vs. Massey, 8 How., 314; Guitard vs. Stoddard, 16 How., 512; Dent vs. Sigerson, 29 Mo., 489; McGill vs. Somers, 15 Mo., 80.) A very able and otherwise accurate brief before us states that the survey No. 3309 was approved in 1856. We search the record in vain for evidence of such approval. The surveyor-general, under date October 8th, 1856, certifies that the accompanying description of the survey
639 is "correctly copied from the original field-notes returned by Joseph C. Brown," on file in his office. No word of approval of the survey appears here or elsewhere. We have already shown that by the very terms of the MacRee patent there was no valid claim to the land embraced in that survey which could operate to diminish the grant.

James Y. O'Carroll was the owner of 640 acres of land in New Madrid County, which, after it had passed out of his hands, was injured by earthquakes, in the year 1811. A certificate for relocation was issued by the U. S. recorder in November, 1815. On June 16, 1818, Christian Wilt, having by a succession of transfers become owner of the certificate, procured its location on lands in St. Louis County, which was duly surveyed and designated as survey 2498, containing 640 acres. Wilt died and Joseph Hertzog, his surviving partner in business, appears to have held the New Madrid claim as belonging to the assets of the late firm. He executed a deed of trust to Robert Wash, trustee, who, on October 27, 1824, reciting in general terms that his conveyance was in pursuance of the trust, conveyed 64 acres off the western end of the tract to Pierre Chouteau. On May 17, 1825, the entire tract was conveyed to Henry Clay by sheriff's deed, under a judgment against Hertzog, surviving partner, &c. In March, 1832 a decree was rendered vesting in Henry Clay

all the title remaining in the heirs of Wilt, deceased, and in Robert Wash, trustee, to the tract of 640 acres. In the same year Mr. Clay agreed to convey the land to William MacRee in consideration of $500, which
640 MacRee paid him. MacRee died, leaving three heirs, two of whom, in 1836, released, with covenants for further assurance, to Samuel MacRee, the third heir; and on October 11, 1839, Mr. Clay, reciting his agreement with William MacRee, conveyed the tract to the three heirs. By a deed dated August 30, 1838, acknowledged October 31, 1839, and recorded November 8, 1839, Samuel MacRee "bargained, sold, released, quitclaimed, and conveyed" to Pierre Chouteau, jr., the 64 acres which had been conveyed to the same grantee by Robert Wash, trustee. In 1844 Samuel MacRee filed a bill in equity, tracing the course of the inchoate title from Christian Wilt, through Joseph Hertzog and Henry Clay, to himself, and praying a decree against the heirs of George W. Wilt, who was the only son and heir of Christian Wilt. In 1848 a final decree was rendered, vesting in Samuel MacRee all the title to the New Madrid location of which Christian Wilt had died seized. MacRee had previously, in 1845, conveyed to Lucas and Hunt a part of the tract, bounding it by the sixty-four-acre parcel which he had sold to Pierre Chouteau, jr. Samuel McRee died in 1849, leaving a last will whereby his property was bequeathed to Mary MacRee, his wife.

The survey No. 2498 was duly returned to the land office in 1841, and a patent certificate No. 147 was thereupon issued to James Y. O'Carroll or his legal representatives. On June 10, 1862, the patent already described was issued to Mary MacRee, who, on August 8, 1862, conveyed to the plaintiff herein the 64-acre tract before mentioned.
641 Part of this, as already stated, is the land here in controversy. The defendants have succeeded to whatever rights were acquired by Pierre Chouteau, jr.

Upon this state of facts it is claimed for defendants that they are equitable owners of the 64 acres, as to which the patent to Mary MacRee gave her no more than the legal title, encumbered with a trust for Pierre Chouteau, jr., or those claiming under him. It is not disputed that Gibson, when he took the deed from Mrs. MacRee, had full notice of the antecedent conveyances and transfers, so that he is bound by whatever trust attached to his grantor. To this claim the plaintiff responds that the whole subject-matter is res judicata; that the same claim of equitable rights was involved in the former suit between the same parties, and was therein finally decided upon against the defendants. In the suit of Gibson vs. Chouteau, commenced in September, 1862, the petition was in its general form adapted to an action of ejectment, but it contained a statement to the effect that Mrs. Mary McRee, was, prior to August 20, 1862, invested by the United States with the title to the premises sued for, and being so invested with the title thereto, conveyed the same to the plaintiff. It is now argued by the plaintiff that these allegations made the proceeding something more than a mere possessory action, and that under our code of practice the element of title was properly introduced as a distinct feature in the pleadings; so that the ultimate judgment in
642 plaintiff's favor did not, as in case of an ordinary ejectment, leave the door open for subsequent litigation between the same parties, of possessory rights dependent upon title in the same land. The error

of this assumption is apparent when we consider that a decree of title cannot be blended with a judgment for possession. An action of ejectment cannot be maintained under the guise of a bill in chancery. (Baker vs. City of St. Louis, Mo. app. No. 1092.) The distinction between, and the necessity for keeping separate, the power exercised by a court of equity and those of a court of law, have been uniformly recognized in this State, notwithstanding the code. There was in the petition under consideration no prayer for a decree of title; judgment for possession only, with damages, &c., was demanded. The action was purely possessory, and the allegations about title were surplusage.

The answer in that suit put in issue the allegations of the petition, set up the defence of limitation, and charged that the right, title, and interest which the plaintiff pretended to have, and any deed which he might produce in support thereof, were acquired by plaintiff as agent or attorney for defendant Chouteau, and were fraudulently made to the plaintiff in violation of the defendant's rights. Wherefore, no title could vest thereby in the plaintiff to the prejudice of defendants. It did not set forth any specific equitable claim or defence arising out of the facts above detailed in our history of the title. The plaintiff's reply put in issue the
643 affirmative allegations in the answer.

Under the pleadings thus framed testimony was introduced showing every event in the transmission of the O'Carroll claim, including the various suits and decrees, with the several transfers and inheritances from its inception to the commencement of the suit. When the case reached the supreme court that tribunal reviewed all the testimony, and considered specially the equities claimed by defendants in connection with the conveyance to Pierre Chouteau, jr., prior to the issuing of the patent. It held as controlling propositions that the deed from Samuel MacRee to Chouteau, being nothing more than a quitclaim, had no operation to carry an after-acquired title in the grantor; that at the date of that deed Samuel MacRee had nothing to convey, and that his first acquisition of the inchoate equitable title, which afterwards ripened into a legal title by patent to his devisee, was in the judicial decree of 1848, whereby he was invested with all the title whereof Christian Wilt had died seized. If this be the law of the case it is manifest that the defendants had no standing in a court of equity, and have none now.

But the defendants now ask us to review these rulings of the supreme court, or rather to consider de novo the questions settled by them, because, among other reasons, they did not properly arise upon the record in the former case. It is insisted that, in order to ascertain
644 what questions were really before the supreme court, we must scrutinize the record as it left the court below. From this it is to be inferred that, if we find the appellate tribunal travelling out of that record to reach its conclusions, we are authorized to treat such conclusions as mere dicta, and not as the binding utterances of judicial authority. Hence we are favored with arguments of unquestionable ability against the soundness of the reasoning of the supreme court and its results. We are shown that the judicial decree rendered in 1848 vested no new title whatever in Samuel McRee; but, like all other judgments, was a mere ascertainment of his rights as they previously existed. That if there had emanated from the United States a sufficiency of the insignia of equitable ownership to found thereon a solemn judicial declaration of such owner-

ship in Samuel MacRee, then it must have so emanated prior to the decree. And as nothing had passed from the United States to MacRee since the date of his deed to Chouteau the equitable title must have existed in him as fully when he delivered that deed as it ever did afterwards. That the only event of any sort affecting the land between that execution of MacRee's deed and the rendition of the decree was the return of the survey in 1841; that this only perfected the location, which location was recited in McRee's deed as having been already perfected, wherefore MacRee and all claiming under him were estopped to deny the fact of
645 a perfect location at the date of the deed. The return of the survey was therefore immaterial, except as it might enure to the benefit of MacRee's grantee. From all which it follows that MacRee's quitclaim to Chouteau conveyed precisely the same equitable title which the decree ascertained to be in him, and which he afterwards undertook to bestow upon Mrs. Mary MacRee in a devise which he had no power to make.

This may hardly claim to be even a faint outline of the leading propositions maintained by defendants' counsel with an acuteness of analysis and a copiousness of illustration which, considered upon their intrinsic merits alone, might impress us as being exhaustive if not unanswerable; but the question remains whether this court is at liberty to yield to any such impressions, in view of what has been said by its superiors in judicial authority.

It is an ancient maxim that "He who knoweth not the reason of the law, knoweth not the law." It is said upon high authority that the decisions of the most exalted tribunals carry no weight with enlightened mankind, except as they are supported by sound reason. The highest courts know, to our State and Federal Constitutions are required by law to deliver their adjudications in written opinions, which means that the decision itself shall not be more potent than the reasons which sup-
646 port it. These are, in moral effect at least, its charter of authority. The rule yields nothing to insubordination against the judicial mandate, yet it invites criticism from every source upon the logic which leads to the decree. Nowhere in our institutions can the popular mind rest upon any stronger assurance of liberty perpetuated under a government by law. It may, therefore, be a duty no less than a privilege for appellate courts of every grade to declare their views, whether concurrent or otherwise, upon the reasoning of their superiors, while yet conforming to the conclusions reached by the higher authority. In this way an additional contribution may sometimes be made to those exact processes of logic which will lead at last to the true result. But in the present case, were anything to be hoped for from a review of former decisions, we could add nothing to the thorough presentations before us in the brief on file. It may be admitted that, considering the form of the pleadings in the former suit, there is no technical res judicata to obstruct an examination into the merits of the equitable defences in the present case. It may be that not a single fact then put in issue need be inquired into upon such an examination. But it is none the less true that every court is bound by the legal conclusions formally announced by its direct superior in appellate authority. Our supreme court found and in effect declared, as matter of law,
647 that the equities which the defendants here plead were a legitimate subject of judicial inquiry upon the record then before them. We

are not at liberty to dispute it. According to this ruling, we have now before us literally the same case, whose decision by the supreme court is reported in 39 Mo. Rep., 536. This decision was by the Supreme Court of the United States considered so far conclusive against the claims here introduced in the defence, that it was declared that the defendants were strangers to the party who initiated proceedings for the land, "and to his equitable claim or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder." (13 Wall.) It would be unfair to assume that this conclusion of the Federal Supreme Court was founded upon its own estimate of the defendants, relations with the land. The tenor of the whole opinion shows that in this particular the court simply yielded to the exclusive jurisdiction of the supreme court of Missouri to decide upon those matters, and therefore adopted the effect of its decision in its application to the questions of Federal judicial cognizance. It cannot be expected that this court will be slower than the Supreme Court of the United States to recognize a controlling authority, as it lawfully resides in the supreme court of Missouri.

For these reasons we cannot sustain the equitable defences here
648 set up against the plaintiff"s recovery of so much of the 64-acre tract as is not affected by valid interferences. For error in the instructions touching the Calve survey, the judgement is reversed and the cause remanded.

All the judges concur.

EDW'D A. LEWIS.

And afterwards, at the same term of said court, the following further proceedings were had in said court, to wit:

THURSDAY, *March* 13*th*, 1879.

CHARLES P. CHOUTEAU ET AL.,
appellants,
vs.
CHARLES GIBSON, RESPONDENT.

Now at this day come the said appellants, by their attorneys, and file their affidavit for an appeal herein, and on their motion an appeal is granted them to the supreme court of the State of Missouri from the judgement herein rendered—

Which motion and affidavit for appeal are, respectively, in the words and figures following, to wit:

Motion for appeal.

In the St. Louis court of appeals, March term, 1879.

CHARLES P. CHOUTEAU AND JULIA MAFFITT
vs.
CHARLES GIBSON.

Now come the said Charles P. Chouteau & Julia Maffitt and pray an

appeal to the supreme court of Missouri from the judgment of the
649 St. Louis court of appeals, against them in this behalf rendered.

THOS. T. GANTT,
For Julia Maffitt.
GLOVER & SHEPLEY,
For Charles P. Chouteau.

Affidavit for appeal.

In the St. Louis court of appeals, March term, 1879.

CHARLES P. CHOUTEAU AND JULIA MAFFITT
v.
CHARLES GIBSON.

Charles P. Chouteau and Julia Maffit, being duly sworn, say on their oath that the appeal prayed for in this case is not made for vexation or delay, but because affiants believe themselves to be aggrieved by the judgement of this court.

CHAS. P. CHOUTEAU.
JULIA MAFFITT.

Sworn to and subscribed before me this thirteenth day of March, 1879.
[SEAL.] C. C. ACKER, *Notary Public.*
Commission expires Jan'y 26th, 1882.

STATE OF MISSOURI, *ss:*

I, Josiah Thornburgh, clerk of the St. Louis court of appeals, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully
650 as the same remains on file of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 25th day of March, A. D. 1879.

[SEAL.] J. THORNBURGH, *Clerk.*

And afterwards, to wit, at the October term, A. D. 1881, of the supreme court of Missouri, and on the 27th day of October, A. D. 1881, the following further proceedings were had in said cause, to wit:

CHAS. P. CHOUTEAU ET AL., APP'L'S,
vs.
CHAS. GIBSON, RESP.
} Appeal from St. Louis court appeals.

Come now the parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, at the April term, A. D. 1882, of said court, and on May 22nd, A. D. 1882, the following further proceedings were had in said cause, to wit:

651 CHARLES P. CHOUTEAU AND JULIA MAFFITT, appellants,
vs.
CHARLES GIBSON, RESPONDENT.
} Appeal from St. Louis court of appeals.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis court of appeals rendered, be in all things affirmed, and stand in full force and effect. And it is further considered and adjudged by the court that the said respondent recover against the said appellants his costs and charges herein expended, and have therefor execution.

Opinion filed.

Which said opinion is in the words and figures as follows, to wit:

652 Supreme court of Mo., April term, 1882.

CHARLES P. CHOUTEAU ET AL., APPELLANTS,
vs.
CHARLES GIBSON, RESPONDENT.

Opinion of the court.

This cause is here on the appeal of plaintiffs from a judgment of the St. Louis court of appeals affirming the judgment of the circuit court of St. Louis County in dismissing plaintiffs' petition and rendering judgment for defendant. The reason for this action on the part of the St. Louis court of appeals is given in the opinion rendered by said court in the case of Gibson vs. Chouteau and others, and reported in 7 Mo. Appeals Rep., p. 1.

The reason therein given is that the same matter sought to be litigated by plaintiffs in their bill had been litigated in a former suit brought by Gibson vs. Pierre Chouteau et al., and reported in 39 Mo., 566, and that all the questions involved in the present suit had been determined in that suit so as to be res judicata between Gibson and Chouteau, and all in privity of estate with Chouteau, and that therefore plaintiffs were estopped from prosecuting this suit. The object of the present suit is to divest Gibson of the legal title to 64 acres of land in the petition described, upon the ground that at the time Gibson acquired the legal title thereto the equitable title was in plaintiffs, and that he had knowledge of that fact, and

653 therefore took the legal title subject to their equity.

Plaintiffs set up in their petition that the 64 acres of land in controversy was a part of 640 acres located by Christian Wilt in virtue of a certificate of location, dated Nov. 30, 1815, which was issued to James Y. O'Carroll or his legal representatives in lieu of 640 acres of land in New Madrid County which had been confirmed to said O'Carroll, and which had been injured by earthquakes.

The bill sets forth with great particularity the claim of title on which plaintiffs base their equitable claim, and may be summarized as follows:

1. New Madrid certificate No. 150, issued to James Y. Carrol or his legal representatives, authorizing him or them to locate 640 acres of land.

2. Deed from said O'Carrol, dated 29th November, 1805, acknowledged

the same day and recorded on the 18th of March, 1809, conveying to George Ruddel 640 acres of land in New Madrid County, in lieu of which said certificate No. 150 was issued.

3. Deed of George Ruddle to James Tanner and A. P. Gillespie, dated 7' of March, 1816, conveying to them, their heirs and assigns an undivided interest in 550 acres of said tract.

4. Deed from A. P. Gillespie to James Tanner of all his right, title, and interest in and to said O'Carrol tract, acknowledged and recorded on the 18th day of October, 1816.

5. Deed from said George Ruddle to A. P. Gillespie, conveying and undivided interest of two hundred arpents of the said O'Carrol
654 tract, executed on the 26' May, 1818, and recorded the following June.

6. Deed from A. P. Gillespie, conveying to James Tanner the said two hundred arpents in said O'Carrol claim.

7. Deed from James Tanner in 1819, conveying to Christian Wilt the said 640 acres, it being the O'Carrol tract, and authorizing said Wilt to locate the said certificate 150, issued to said O'Carrol or his legal representatives.

8. The location of said certificate and a survey made thereof by Joseph C. Brown, deputor sur'vor of the United States, in April, 1818, which survey was not returned to the recorder of land titles till the 10' August, 1841.

9. Deed of trust, dated 26th October, 1822, made by Joseph Hertzog, conveying to Robert Wash said 640 acres of land located by said Wilt in trust to pay a debt which said Hertzog owed to one Devotion.

10. Deed from said Wash, as trustee, dated 27th November, 1824, conveying to Pierre Chouteau, father of the plaintiffs, 64 acres, part and parcel of said tract of 640 acres located by said Wilt.

11. Sheriff's deed, acknowledged May 27, 1825, and recorded in St. Louis County June 27, 1825, conveying to Henry Clay all the interest of Joseph Hertzog in said 640 acres located by said certificate No. 150. This sale was made to satisfy an execution *wish* issued upon a judgment obtained by said Clay as executor of William Morrison.

655 12. Deed from Henry Clay, acknowledged the 11th October, 1839, conveying the said 640 acres of land to Anne McRee, James F. McRee, and Samuel McRee.

13. Deed from Anne McRee, James F. McRee, and May, his wife, conveying to Samuel McRee their interest in said land.

14. Deed from Samuel McRee and wife, acknowledged Oct. 31, 1839, and recorded Nov. 8, 1839, whereby he bargained, sold, released, and quitclaimed to Pierre Choteau 64 acres, part of the tract located under the New Madrid certificate issued to James Y. O'Carrol or his legal representatives.

15. Deed from Charles S. Hempstead as guardian of George W. Wilt, dated 10th, Sept. 1821 (the said Christian Wilt having died previous to that time, leaving the said George as his only heir), conveying to Joseph Hertzog the 640 acres of land located by said certificate No. 150.

This deed was made in pursuance of a decree rendered by the St. Louis County circuit court in a suit instituted by said Hertzog, in which he set up that the right acquired by Christian Wilt to the said 640 acres of land was acquired with partnership funds, and prayed that said Hempstead

should be directed to convey to him as surviving partner of Christian Wilt the said land.

16. Decree of the St. Louis circuit court in a chancery suit instituted by Henry Clay vs. the heirs of Christian Wilt and Joseph
656 Hertzog and Robert Wash, vesting against the parties named the title in the said land. After setting out the above chain of title it is then averred that said Samuel McRee, on the 23rd of March, 1844, filed his bill in chancery in the circuit court of St. Louis against the heirs of Wilt, the object of it being to have vested in him the legal title to the said land located the said certificate No. 150.

It is then averred that he founded his claim to the relief he asked on the deed from Henry Clay to Anne McRee, James F. McRee, and Samuel McRee, and on the deed from said Anne McRee, James F. McRee, and wife, to the said Samuel. It is also averred that such proceedings were therein had, that a decree was made vesting all the right, title, and interest of defendants in and to the said 640 acres in said Samuel McRee.

It is then averred that the deed of said Samuel, acknowledged in Oct. 1839, conveying 64 acres of the said 640 acres to Pierre Chouteau, operated as an equitable assignment to said Pierre of so much of said certificate No. 150 as covered said 64 acres, and that the title secured by said Samuel by virtue of the said decree to the extent of the said 64 acres enured to the benefit of said Chouteau, and invested him in equity with the title thereto.

657 It is then averred that said Chouteau entered into the possession of said 64 acres in 1824, and remained uninterruptedly in possession till 1860, with the knowledge of said McRee and Gibson.

It is then averred that said McRee died in 1849, leaving a will, in which he devised all his estate to Mary McRee, his widow. It is also averred that the patent which issued in 1862 to said Mary McRee, as the legal representative of J. Y. O'Carrol, to the 640 acres located by said certificate 150, was, in so far as it covered the said 640 acres in controversy, *was* issued in fraud of plaintiffs' rights, and was procured to be issued by the covin and fraud of said Mary and Gibson, and that said Gibson held the 64 acres part of said tract, conveyed to him by Mrs. McRee in trust for plaintiffs and to their use, and asks the court so to decree upon final hearing.

Defendant Gibson, in his answer, after denying specifically the allegations in the petition set up in bar of plaintiff's action, that he commenced a civil action in the St. Louis land court in September, 1862, against Pierre Chouteau (and afterwards continued against the plaintiff and his devisees), to establish his title and recover possession of the said 64 acres; that said Chouteau and others put in issue and set up and had the benefit of the same claim to the equitable right or title
658 that is set up and relied upon in their petition; that the same issue as to the equitable title was involved in that suit which is involved in this suit; that judgment was rendered for the plaintiff by the said land court, which, on appeal to the supreme court, was affirmed, where, upon a consideration of the same documentary evidence in that case which plaintiffs now set up in their petition, it was adjudged that said Chouteau had neither legal or equitable claim to said 64 acres of land.

This defence is set up at great length and with great particularity in said answer, but it is substantially as above stated.

To this answer a replication was filed, putting in issue the new matter therein stated. Upon the trial plaintiffs put in evidence all the deeds and documentary evidence set out in the petition (and referred to in our statement of the case) in support of his equitable claim; and defendant Gibson, in support of his plea of res judicata, put in evidence the record of the suit of Gibson vs. Chouteau et al., commenced in the St. Louis land court in 1862, the transcript of the record of said cause upon the appeal from the judgment of said court, transcript of record of the cause on appeal to the Supreme Court of the United States, and also the briefs and
659 argument of counsel. The first question, therefore, which the record before us presents is whether or not the equitable claim, right, and title set up in plaintiffs' petition was passed upon in the said suit of Gibson vs. Chouteau commenced in the St. Louis land court in 1862, so as to be res judicata.

In order to a proper solution of the question propounded resort must be had to the record of said former suit, and the judgment of the land court and this court rendered upon it.

It appears from the petition in said cause that it was an action of ejectment to recover possession of the same 64 acres claimed by plaintiff in this suit.

The petition differed from the usual form of a petition in such actions, in this, that plaintiff averred he based his right to recover upon the patent which issued to Mary McRee, in 1862, covering said land and a deed from her to Gibson, conveying the said land. In the answer to this petition, Chouteau set up among other defences an actual, open, adverse, notorious possession of the premises sued for, for more than ten years previous to the institution of the suit, and pleaded the statute of limitations as a bar to plaintiff's action. It is also averred in said answer, "that all the right, title, and interest of plaintiff, which he claims to have in said premises, and all and every deed which he may produce and show
660 in support of said title and claim, were acquired by said plaintiff as agent or attorney of and for the defendant; and defendant says each and every deed for said premises or any part thereof, under which plaintiff claims or pretends to claim said premises, were procured and obtained by said plaintiff while acting as agent for this defendant, and such deeds were fraudulently and wrongfully made to said plaintiff, by his procurement in violation of the rights of this defendant, instead of to this defendant, as of right they should have been; and defendant denies that by virtue of any such deed or conveyance in any form, any right or title vested or could vest in the said plaintiff to the prejudice of this defendant; and defendant denies that plaintiff can or ought to maintain this suit, or be allowed to use such deeds in evidence in support of his pretended claim to the premises."

The record further shows that defendant Chouteau, over the objection of plaintiff that the answer was not specific enough to let the evidence in, was allowed to put in evidence, in support of his equitable defence, every deed and all the documentary evidence which is set up in the petition in the present case as the basis of plaintiff's equitable claim.

It also shows that the judgment of the said land court was adverse to defendant and in favor of plaintiff.

It also shows that upon Chouteau's appeal from said judgment to this

court, that the action of the land court in holding that defendants had not established either a legal or equitable to the land in controversy was in
that respect affirmed, but that its action in not sustaining defend-
661 ant's plea of the statute of limitations was erroneous, and reversed the judgment for that reason. (39 Mo., p. 566.)

It also appears that on appeal from said judgment to the Supreme Court of the United States it was held by that court that this court committed error in holding that the statute of limitations of this State began to run before the patent to the land in controversy had issued from the Government, and for that reason reversed the judgment of this court, and remanded the cause for further proceedings. (Gibson vs. Chouteau, 13 Wall, 92.) It also appears that when said cause was again taken up by this court, in the disposition of it it was observed by Judge Wagner, who delivered the opinion, that "when this cause was in this court at its October term, 1866, we then decided the whole case in favor of respondents, with a single exception, namely, the statute of limitations. Upon that question we ruled against him, and held that he was barred. On that single point he appealed to the Supreme Court of the United States, and that tribunal reversed this court, and he now presents his motion asking that judgment be entered in his favor.

"There is obviously nothing more for this court to decide, or for any court to retry, that is not res adjudicata. Upon every question of State jurisdiction we held for him, and the Supreme Court of the United States has decided the remaining point coming within Federal cognizance for him, and we therefore think he is entitled to his judgment."

Gibson having entered a remittitur for certain portions of common
field lots with which the patent under which he claimed interfered,
662 the judgment of the St. Louis land court was affirmed. (Gibson vs. Chouteau, 50 Mo., 85.)

Thus was the cause of Gibson vs. Chouteau finally ended, and the questions decided in that case and raised by the pleadings, as construed by the court, cannot be reagitated in another suit.

"Nemo bis vexari pro endem causam."

"An allegation of record upon which issue has once been taken and found, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once found." (Outram vs. Moorewood, 3 East., 346.)

"A judgment inter partes is always admissible for or against parties or privies when the same subject-matter is a second time in controversy between the same persons or parties claiming under them. Probably, indeed, it will not be regarded as quite conclusive of the rights in dispute unless it be pleaded as a matter of estoppel.

"The conclusive effect of judgments respecting the same cause of action and between the same parties rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and the same cause of action should not be brought twice to a final termination." (2 vol. Taylor on Evidence, sec. 1497, p. 1408.)

"It matters not in regard to the conclusive effect of a judgment whether the plaintiff in the second action was the plaintiff or defendant in the first, provided the point in dispute be the same in both suits." (2 vol. Taylor's Ev., sec. 1510, p. 1422.)

663 "It has been laid down as a general rule, which is recognized alike in all the courts, that when a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted a part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time." (2 vol. Taylor, Ev., p. 1425, sec. 1513.)

It has recently been held in North Carolina, in case of Tuttle vs. Harrill, "except in special cases the plea of res judicata applies not only to points upon which the court was required to pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties exercising reasonable diligence might have brought forward." (The Reporter, March 29, 1882, p. 408.)

"When can a matter said to be res judicata; and what is the extent of the doctrine known in the books as stari decisis? As to the first,
664 we understand the rule to be that a decision *was* made in a case by the highest court empowered to pass upon it is conclusive upon the parties to the controversy and their privies, who are not allowed afterwards to revive it in a new proceeding for the purpose of raising the same or any other question. The matter in controversy has become res judicata, a thing definitely settled by judicial decision, and the judgment of the court imparts absolute verity. Whatever the question involved, whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of finality is the same. The controversy has been adjudged, and once finally passed upon is never to be renewed." (Cooly, Const. Lim., p. 47.)

"A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided." (School Trustees vs. Stocker, 42 N. J. L., p. 117.)

Giving force and effect to the above principles we must return an affirmative answer to the question propounded. That defendant, Chouteau, had the right to interpose an equitable defence to the action of Gibson, and not only prevent a recovery upon establishing such defence, but would be entitled to affirmative relief if asked, there can be no doubt, for it is expressly provided in the code that "a defendant may set forth by answer as many defenses*es* or counter-claims as he may have, whether they be such
665 as have heretofore been denominated legal or equitable, or both." (Gen'l Stat. 1865, p. 659, s. 13.)

It is also provided "when any action for the recovery of the possession of premises any land shall be claimed by virtue of a location in lieu of other lands injured by earthquakes, the certificate of new location granted

by the recorder of land titles, and the patents issued in consequence shall be only prima facie evidence of the title in the grantee therein named, subject to be rebutted as hereinafter provided." (General Statutes 1865, sect. 11, page 375.)

"It shall be lawful for the adverse party to rebut such evidence by proof that the grantee in such certificate or patent named was not at the time the same, or either of them, issued the owner of the injured land, in lieu of which the said certificate patent issued and the title to the land located by virtue of such certificate or patent, shall be determined according to the rights of the parties to the land, as located by virtue thereof." (General Statutes 1865, sec. 12, p. 608.)

It cannot be doubted that Chouteau had the unquestioned right to set up in his answer to Gibson's petition any and all equitable defenses he had. That he undertook to avail himself of this right, and to set up and equitable defence is shown by his answer. That such defence was sufficiently set up in the answer to allow Chouteau, in support of it, to introduce in evidence all the deeds and documentary which are recited and set forth in the petition in this suit as the basis of their
666 equitable claim is shown by the action of the land court in receiving it over Gibson's objection; that the defence sought to be established by it was not pleaded with the requisite particularity and exactness; and it is also shown by the action of this court, when the cause reached it on Chouteau's appeal in fully considering the documentary evidence offered and brought forward by Chouteau in support of his equity, and holding that it was wholly insufficient to connect him with either the legal or equitable title to the land in suit, and "that the defendants, on the evidence had not even the equitable title which would support an action of ejectment under the statutes of this State, they were reduced to the naked possession without the shadow of title, and must therefore be considered with reference to the documentary evidences of title issued by authority of the United States, and with reference to the statute of limitations as mere intruders." (Gibson vs. Chouteaux, 39 Mo., 566.) But it is earnestly and forcibly argued by the learned counsel that the court misconstrued the answer, in holding that it presented the equitable defense passed upon, though in their argument before this court it was contended by them that it did present it, it is now insisted in argument before us that it in fact did not present it. In passing upon the plea of res judicata the question is not whether the court decided the point involved right or wrong, but
667 the question is: Did it decide, and is the decision final? While the answer of defendants, in setting up their equitable defense, might have been excepted to because of the generality of its averments, and defendants have been required to make it more specific, the most that can be said of it is that it stated such defense defectively, and we have repeatedly held that a judgment rendered upon a petition which states a cause of action defectively is good after verdict, and will be upheld. (Frazier vs. Roberts, 32 Mo., 457; Smith vs. City of St. Joseph, 45 Mo., 450; Garth vs. Caldwell, 72 Mo., 622; Edmundson vs. Phillips, 73 Mo., 57.) The same rule is equally applicable to an answer as well as to a petition.

The requirement of particularity in a pleading is intended for the benefit of the opposing party, and if such party waives it by not taking appropriate legal steps to have the pleading corrected in this respect, and thus gives to the pleader the full benefit of his defense, though defectively

pleaded, he ought not when the whole defence is actually tried as if it were in, and when judgment is pronounced upon it adversely to him, to be heard to complain that his pleading was not sufficiently specific to apprise the opposite party of his claim. An illustration of the correctness of the principle above stated may be found in that class of cases represented by the case of Hausby vs. Carrnifax, 49 Mo., 296, in which it was held that notwithstanding the provision of the code of practice which declares
668 that all new matter set up in an answer unless denied by replication shall be taken as confessed, and notwithstanding the fact that no replication had been filed in the cause putting in issue the new matter set up in the answer, that the trial court erred in instructing *in instructing* the jury that "the allegations of the answer must be taken as true for the want of a replication." The reason given for this ruling was that the parties had conducted the trial precisely as though the reply had been made. They stood by and saw heavy costs accumulate in making out plaintiff's case, adding to them the cost of their own witnesses, and then asked the court to declare that their defence had been admitted from the beginning. This will not do, and courts should not allow traps to be thus sprung, although upon the inattentive.

So in the case of Slack vs. Lyon, 9 Pick, 62 Parker, c. j., observed that if "the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy."

We have been cited by the learned counsel for plaintiffs to a class of cases where this and other courts of last resort have reversed their own rulings when they have found that a rule laid down in a former decision is so unfounded in law or so mischievous in its consequences that they feel compelled to overrule it.

669 An instance of this is to be found in the case of Bates vs. Bates, adm'r, 13 Mo., 217 (to which, among others, we have been cited), overruling the cases of Sherer vs. Whittlesy, 7 Mo., 473, and Bedford vs. Bradford, 8 Mo., 233.

A more recent instance is to be found in the case of Boagher vs. The Life Asso. of America (decided at this term), in which it is held that a corporation could be sued for malicious prosecution, overruling the case of Gillet vs. The Mo. Valley R. R. Co., 55 Mo., 315, which laid down the rule that a private corporation was not liable in an action for malicious prosecution.

But while this may be, and is often done, the right of a party to reagitate and sue again upon the same cause of action adjudged in a case subsequently overruled in another case between other parties, or the same parties upon another cause of action, is concluded and is forever gone. And we have been unable to see the relevancy of the class of cases to which we have been cited of which the case of Bates, adm'r, vs. Bates, adm'r, is one.

If they have been referred to to establish the proposition (assumed by counsel in argument) that the doctrine of res judicata does not apply to a court of last resort they are wholly ineffectual for that purpose, and the answer to the proposition assumed may be found in Bigelow on Estopp., p. 16, where it is said: "It seems hardly necessary to state that a judg-

ment of a court of last resort cannot be collaterally attacked in that or any other court, but the point has been raised and so ruled." In
670 Sturgis vs. Rogers, 26 Ind., p. 1, it was said: "A judgment of a court of nisi prius rendered under such circumstances could never be called in question collaterally before the same or any other court. It must be so also as to the judgment of the court of last resort when it has jurisdiction, though it mistake the law and err in its judgment. The rule is as essential in the one case as it is in the other to the repose of society and the stability of private rights. To say that a judgment of affirmance here, within the power of the court to render, where the parties are before the court and the case is brought within its lawful jurisdiction, is not a final end of that litigation, would be a startling doctrine, asserting that a cause can never have a final termination."

For the reasons above given the judgment of the St. Louis court of appeals, in affirming the judgment of the circuit court in dismissing plaintiff's petition or bill, is hereby affirmed, in which all concur.

E. H. NORTON, *J.*

671 Supreme court of Mo. April term, 1882.

CHOUTEAU *vs.* GIBSON.

Separate opinion.

We concur in affirming the judgment in this case, on the ground that the matters now in issue have heretofore been passed upon by this court in another suit between the same parties, and have therefore passed in rem judicatam.

WARWICK HOUGH.
JNO. W. HENRY.
ROBT. D. RAY.

672 And afterwards, to wit, at the same term of said court, and on the 24th day of May, A. D. 1882, the following further proceedings were had in said cause, to wit:

CHAS. P. CHOUTEAU ET AL., APP'L'S, *vs.* CHAS. GIBSON, RESP. — Appeal from St. Louis court of appeals.

Now at this day come the said appellants by attorney, and upon motion, leave is granted them to file a motion for rehearing herein, on or before the first day of next term, appellants to serve respondent with copy of their brief in support of same within sixty days.

And afterwards, to wit, in vacation, and on the 27th day of July, A. D. 1882, the following further proceedings were had in said cause, to wit:

CHAS. P. CHOUTEAU ET AL., APP.,
vs.
CHAS. GIBSON, RESP.
} Appeal from St. Louis court of appeals.

Now at this day come the said appellants, by attorney, and file their motion for a rehearing herein, which said motion is in the words and figures as follows, to wit:

673 In supreme court of Missouri. In vacation.

CHARLES P. CHOUTEAU AND JULIA MAFFITT, appellants,
vs.
CHARLES GIBSON, RESPONDENT.

Now come the said appellants according to leave given by this court on 24th May, 1882, and file this their motion, praying the court here to grant them a rehearing of this cause for the following reason', viz:

1. Because the court in its opinion and decision in this cause overlooked the question of the scope and extent of a judgment in ejectment, although that question was duly submitted by counsel for appellants.

2. Because the decision of the court proceeds upon a supposed denial by the counsel for appellants of certain legal propositions which counsel for appellants did not intend to, and, in fact, did not dispute, the affirmance of which did not in any degree involve the affirmance of the judgment in this cause.

3. Because the court supposed the counsel for one of the appellants to assume certain untenable positions, which said counsel did not in fact assume, and so supposing the court misunderstood the views of that counsel and misapprehended his argument.

4. Because the decision, as made, is in conflict with the statutes
674 and the uniform course of decisions of this State, as is more particularly set forth in the printed argument of appellants in support of this motion for a rehearing herewith filed.

THOS. T. GANTT,
For Julia Maffitt, Appellant.
GLOVER & SHEPLEY,
For Chouteau.

On the back of said motion appear the following indorsements, to wit: Charles P. Chouteau and Julia Maffitt, appellants, vs. Chas. Gibson, respondent. Motion for rehearing filed by leave of court. Filed July 27, 1882. Henry W. Ewing, cl'k, by E. B. Ewing, d. c.

And afterwards, to wit, at the October term, A. D. 1882, of said court, and on the 27th day of October, A. D. 1882, the following further proceedings were had in said cause, to wit:

CHAS. P. CHOUTEAU ET AL., APP.,
vs.
CHAS. GIBSON, RESP.
} Appeal from St. Louis court of appeals.

Now, at this day, the court having fully considered and understood the

motion of said appellants for a rehearing of this cause, doth order that the same be denied.

675 And afterwards, to wit, at the same term of said court, and on the 9th day of December, A. D. 1882, there was filed in the above-entitled cause an appeal bond, which is in the words and figures as follows, to wit:

Know all men by these presents that we, Charles P. Chouteau and Julia Maffitt as principals, and Joseph H. Sheets and P. Chouteau Maffit as sureties, are held and firmly bound unto Charles Gibson, defendant in error, in the full and just sum of one thousand dollars, to be paid to the said Charles Gibson, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this second day of December, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the October term, A. D. 1882, of the supreme court of the State of Missouri, in a suit depending in said court *between* Charles P. Chouteau and Julia Maffitt were appellants and Charles Gibson was respondent, judgment was rendered against the said appellants; and the said appellants having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles Gibson, respondent, and now defendant in error, citing and admonishing him to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

676 Now, the condition of the above obligation is such that if the said Charles P. Chouteau and Julia Maffitt, plaintiffs in error, shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

CHARLES P. CHOUTEAU. [SEAL.]
JULIA MAFFITT. [SEAL.]
JOS. H. SHEETS. [SEAL]
P. C. MAFFITT. [SEAL.]

Sealed and delivered in presence of—

Approved by—

T. A. SHERWOOD,
C. J. S. C. Mo.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

Before me, clerk of the United States circuit court for the eastern district of Missouri, personally appeared Joseph H. Sheets and P. Chouteau Maffitt, sureties in the foregoing bond, to me well known, who upon oath state that they are worth over and above all indebtedness the sum of one thousand dollars, and that they own real property to that amount subject to execution in the county of St. Louis, Missouri.

JOS. H. SHEETS.
P. CHOUTEAU MAFFITT.

Subscribed and sworn to before me this 5th day of December, 1882.
[SEAL.]
M. M. PRICE, *Clerk*,
By A. P. SELBY, *D. C.*

677 On the back of said bond appear the following endorsements, to wit: No. . Charles P. Chouteau et al., pl'ffs in error, vs. Charles Gibson, def't in error. Appeal bond. $1,000.00. Filed 9th day of Dec., 1882. Henry W. Ewing, clerk.

STATE OF MISSOURI, *set:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record and proceedings of the above-entitled cause as fully as the same remain of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court. Done at office, in the city of Jefferson, this 30th day of December, A. D. 1882.

[SEAL.] HENRY W. EWING, *Clerk.*

(Endorsement on cover:) No. 818. Charles P. Chouteau and Julia Maffitt, plaintiffs in error, vs. Charles Gibson. Missouri supreme court. Filed 13th January, 1883.

111-200

SUPREME COURT U.S.
FILED
JAN 23 1884
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM 1883.

CHARLES P. CHOUTEAU
AND JULIA MAFFITT,

Appellants.

vs.

CHARLES GIBSON.

STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS THE WRIT OF ERROR.

JOHN W. NOBLE,
For Respondent Gibson.

Supreme Court of the United States.

OCTOBER TERM 1883.

CHARLES P. CHOUTEAU
AND JULIA MAFFITT,

Appellants.

vs.

CHARLES GIBSON.

STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS THE WRIT OF ERROR.

This suit is in its nature one invoking only the ordinary jurisdiction of a Court of Equity. The judgment in the Circuit Court was a dismissal of the bill, and this judgment was affirmed in the State Courts, solely because the subject was *res judicata*.

In support of these positions, the following brief statement, of facts appearing of record, is submitted:

ABSTRACT OF PLEADINGS.

Petition.

The original petition, as will appear by a very short examination of it, (Record print 3–19) is in the nature of a

bill in equity, alleging facts to show,

First. (Print. p. 12, orig. 37.) An alleged *equitable assignment* of New Madrid Certificate No. 150, by virtue of a certain quit-claim deed mentioned therein.

Second. (Print. p. 13, orig. 39.) That the defendant held the tract of land in question under a patent of the United States, *in trust;* and

Third. (Same pages.) Was *equitably estopped* from denying said land had been properly located.

Fourth. (Print. p. 15, orig. 47.) A conspiracy to cheat plaintiffs out of said land, by securing a patent from the United States therefor *by fraud.*

Fifth. (Print. p. 18, orig. 58.) That said patent was *purchased* as to land in controversy *with money of plaintiffs'* ancestor.

Sixth. That the deed to defendant made by patentee is *a cloud on plaintiff's title.*

And the *prayer* is that Gibson may be declared a trustee of plaintiffs of any right held by him *under the patent* in the tract specified; that he surrender the same; account for rents and profits; that immediate possession be given, and for general relief.

Answer.

The answer (pp. 19–34) denies *seriatim* all the facts alleged by plaintiffs, and adds many facts to refute the averments of the petition, and then makes its own statement to show a valid title in defendant.

The answer then (pp. 31, orig. 109; pp. 34, orig. 120) sets up the defense, "*res judicata*," in the case of Gibson vs. Chouteau, in that therein the plaintiff's ancestor, Pierre

Chouteau, and the plaintiffs afterwards, set up the same things as an equitable defense in the suit in ejectment as are here now set up for equitable relief, as to same subject matter and between the same parties. The answer gives, in the few pages last referred to, a succinct statement of the legal record history of Gibson vs. Chouteau: The decision and judgment in the St. Louis Land Court, October Term, 1864, (p. 31, foot;) the struggle in the Supreme Court of Missouri over this very equitable claim, (pp. 32, orig. 110) and the decision there, (print 32, orig. 111,) (on the same evidence now adduced in this present suit) that Chouteau was not the owner of the equitable title or right; that he had not the shadow of a title, legal or equitable, and was an intruder; the motion of Chouteau for rehearing; the rehearing; the decision of the Supreme Court of Missouri on this rehearing, at March Term, 1867, (print 32–33,) adverse to Gibson on statute of limitations only, and yet entry of general judgment; the writ of error by Gibson to this Honorable Supreme Court of the United States, and the argument here, that as the judgment of reversal was general, and the equity was set up below from the record, the judgment *might* have been against Gibson on the equity branch of the case, *therefore this Court had no jurisdiction*; the decision of this Court, dismissing the writ of error for want of jurisdiction for the reason just stated; the reappearance of Gibson in the State Supreme Court, and his motion there (print 33, orig. 114–115), to set aside the judgment, and to have the record show that the decision was in his favor on the equity branch of the case, and against him on the statute of limitations *only*, which motion was sustained; that Gibson then sued out his *second* writ of error to this Honorable Court; the decision of this Court that the Chouteaus had not connected themselves with the equity, and that limitation did not run until the patent issued and consequently the State Supreme

Court judgment was reversed and the cause remanded; the reappearance of Gibson in State Supreme Court (print. 33, orig. 116,) moving for judgment in his favor, which was granted (print. 34, orig. 117) on condition that Gibson would remit as to land embraced in certain conflicting claims, not in possession of Gibson; and that the persistent presentation and argument of the equitable claims of the Chouteaus delayed Gibson's rights for years, and imposed upon him many expenses. This defense in this present suit concludes as follows (print. 34, orig. 118):

"And defendant now says these facts both estop and bar plaintiffs from again setting up or ever insisting in any Court of Justice upon any claim to the inchoate right under the New Madrid title, or the title conveyed by the patent of June 10th, 1862; and that it would be inequitable and unjust to defendant to permit them to do so."

And the answer further says (print. 34, orig. 119): "Defendant says he did enter into part of same (the premises in dispute) under and by virtue of the judgment of said St. Louis Land Court, rendered in his favor, upon a full hearing of all the title, rights and claims, legal and equitable, of all parties, being the same set forth in the pleadings in this case, and which was affirmed by all the Courts of the State and of the United States, after four trials on the merits in the Supreme Court of this State and two in the Supreme Court of the United States."

Replication.

The replication was a general denial of the affirmative matter of the answer. (Print. 35.)

Such being the issues, judgment was rendered in the State Court having original jurisdiction, in favor of Gibson, dismissing Chouteau's petition. (Print. 35.)

Record and opinion in St. Louis Court of Appeals.

The judgment of dismissal on hearing, by the State Court of original jurisdiction, was affirmed in the St. Louis Court of Appeals. (Print. 256.) At same term Gibson recovered against Chouteau in another ejectment suit for the "Calve survey." In this last named case, that which here appears as a petition was filed as answer by way of equitable defense, as is allowed under the practice of Missouri. The Court of Appeals, in affirming Gibson's judgment in ejectment, had, therefore, to pass on the claims set up in the answer, and, therefore, in effect, upon the claims set forth in the present petition. The opinion in this last named case is part of the record here now, and it says (print. 262, orig. 647):

"Our Supreme Court (in Gibson vs. Chouteau) found, "and in effect declared, as a matter of law, that the equities "which the defendants here plead were a legitimate subject "of judicial inquiry upon the record then before them. We "are not at liberty to dispute it. According to this ruling "we have now before us literally the same case whose deci- "sion by the Supreme Court is reported in 39 Mo. Rep., "536. This decision was by the Supreme Court of the "United States considered so far conclusive against the "claims here introduced in the defense, that it was declared "that the defendants were strangers to the party who initi- "ated proceedings for the land, and to his equitable claim "or equitable title, as it is termed, not connecting them- "selves with it by any valid transfer from the original or any "subsequent holder." (13 Wallace.) "It would be unfair "to assume that this conclusion of the Federal Supreme "Court was founded upon its own estimate of the defend- "ants' relations with the land. The tenor of the whole "opinion shows that in this particular the Court simply "*yielded to the exclusive jurisdiction of the Supreme Court*

"*of Missouri* to decide upon those matters, and, therefore, "adopted the effect of its decision in its application to the "question of judicial cognizance. It cannot be expected "that this Court will be slower than the Supreme Court of "the United States to recognize a controlling authority, as "it lawfully resides in the Supreme Court of Missouri."

Record and Opinion in Supreme Court of Missouri.

This cause, now here, and in which this present motion is made, having been appealed to the Supreme Court of Missouri by Chouteau, there (print. 265,) the judgment of the St. Louis Court of Appeals was affirmed, and in the opinion of that Court (print. 268, orig. 659,) it is said:

"The first question, therefore, which the record before "us presents, is whether or not the equitable claim, right "and title set up in plaintiff's petition, was passed upon in "said suit of Gibson vs. Chouteau, commenced in St. Louis "Land Court in 1862, so as to be *res judicata*."

The Court then discusses the cause on questions of "*res judicata*" and "*stare decisis*."

On print. page 271, the opinion proceeds to hold, that Chouteau could and did present his equitable claims under his answer in Gibson vs. Chouteau, and the Court did decide adversely to him, holding "that the defendants, on the evi- "dence, had not even the equitable title which would support "an action of ejectment under the statutes of this State, they "were reduced to the naked possession without the shadow of "title, and must, therefore, be considered with reference to "the documentary evidences of title issued by authority of "the United States, and with reference to the statute of lim- "itations as mere intruders. (Gibson vs. Chouteau, 39 Mo. "566)."

And the opinion concludes (print. 273,) "for the rea-"sons above given the judgment of the St. Louis Court "of Appeals, in affirming the judgment of the Circuit Court "in dismissing plaintiff's petition or bill, is hereby affirmed "in which all concur.

E. H. NORTON, J."

Three of the other judges gave their separate opinion as follows, (print 273): "We concur in affirming the judg-"ment in this case, on the ground *that the matters now in "issue have heretofore been passed upon by this Court in "another suit between the same parties, and have, therefore, "passed in* REM JUDICATAM.

WARWICK HOUGH,
JOHN W. HENRY,
ROBT. D. RAY."

The Supreme Court of Missouri is composed of only five Judges. Constitution of Missouri (1875), art. VI, sec. 5. Rev. Stat. of Mo., 1879, p. LXX. Three constitute a quorum; *ibid.*

It thus, beyond controversy, appears that the sole question considered and adjudged in this cause in the State tribunals, was the defense of a former adjudication of the rights of the same parties, now here, in regard to the same subject matter, in a State Court of competent jurisdiction; and that this defense was sustained.

We have proved our statement by close reference and quotation as we have proceeded, and the statement being true, it itself makes an argument that is conclusive, as it absolutely excludes from the record any Federal question whatever.

Proposition and Authorities.

I. This cause in the State Appellate Court was decided for the defendant, on his answer of former adjudication solely, and it cannot possibly involve a Federal question, and the writ of error must be dismissed for want of jurisdiction.

a. The opinion of the Court and the separate opinion by a majority (three of the five judges), (print. 273,) show the decision was on the ground, *solely*, of *former adjudication* of the thing in controversy.

b. The opinions are available under the Act of Congress of 1867, to ascertain the basis of the judgment rendered.

Murdoch vs. Memphis, 20 Wallace R., 333;
McManus vs. O'Sullivan, 1 Otto R., 578–579.

II. But even aside from the opinion, the pleadings show the whole scope of the case was merely to have declared *an equitable title on common principles.* It was to have Gibson declared a trustee *under the patent.* The fact that the equity was claimed to arise *in regard* to a patent or the title originating from the United States, did not make it a Federal question.

Romie vs. Casanova, 91 U. S. S. C. R., 379;
Rockhold vs. Rockhold, 92 U. S. S. C. R., 129.

III. If there was any Federal question, it has not been passed on, and its decision was *not necessary* to the determination of the rights of the parties, so it cannot be considered by this Court.

McManus vs. O'Sullivan, 91 U. S. S. C. R., 578;
Bolling vs. Lessner, 91 U. S. S. C. R., 595;
Brown vs. Atwell, 92 U. S. S. C. R., 329;
Rockhold vs. Rockhold, 92 U. S. S. C. R., 129.

e. There was no presentation of any such question on assignment of errors or motion in Courts below.

Motion for rehearing (print 253.)
Assignment of errors (print 255.)
Motion for rehearing (print 274.)
Opinion in State Supreme Court.

But why need we cite any other authority or precedent than that of this Court, pronounced and established between these very parties in regard to the same subject matter.

This Court, in Gibson vs. Chouteau, 8 Wallace R. 314, dismissed the writ of error for want of jurisdiction for the reason that the Court below might have decided the cause on the equitable grounds now presented in this suit, and *because over this subject this Honorable Court had no jurisdiction on appeal from the State Courts.* Mr. Gibson was mulct in costs and had all his expenses to pay because of the application to him of the very principle he now claims shall be, by even handed justice, commended to the lips of Mr. Chouteau.

The history of this litigation demands the doors of the Court should be closed against the plaintiffs in error here. Mr. Gibson has been harrassed by them and their forefathers without the shadow of a right or a vestige of title, for over 21 years, and every Court has declared on the merits for Mr. Gibson. Please to read this line of authority, set forth here in chronological sequence.

1862. September 23d. Petition in Gibson vs. Chouteau filed (print. 113).

1865. January 28th. Judgment in St. Louis Land Court for Mr. Gibson (print 125).

1866. December 3d. Judgment of affirmance in Supreme Court of Missouri (print 159).

See Gibson vs. Chouteau, 39 Mo. R., 536.

1866. December 10th. Rehearing granted (print 161).

1867. April 1st. Judgment of reversal in Supreme Court of Missouri (print. 162).

See Gibson vs. Chouteau, 39 Mo. R., 573.

1868. December Term. Supreme Court of the United States dismisses Gibson's writ of error, because the equitable title was involved, and judgment below *might* have been based on that.

Gibson vs. Chouteau, 8 Wallace, 314.

1869. October Term. Judgment in Supreme Court of Missouri corrected to show question of limitation only decided against Gibson.

Gibson vs. Chouteau, 45 Mo. R., 171.

1881. December Term United States Supreme Court, judgment of reversal and cause remanded to Supreme Court of Missouri, because statute of limitations does not commence to run until patent issues.

Gibson vs. Chouteau, 13 Wallace R. 92.

1872. March Term. Mandate and motion of Gibson for judgment in his favor.

See Gibson vs. Chouteau, 50 Mo. R., 85.,

and judgment accordingly on remittitur.

1873. February 15th. Petition *in equity* by *Chouteau* vs. *Gibson* (print. 3).

1877. October 22d. Judgment for Gibson (print 35).

1879. March 11th. Judgment of affirmance in Chouteau vs. Gibson. St. Louis Court of Appeals. (Print 255).

1882. May 22. Affirmance in Supreme Court of Missouri, (print 264–5), in Chouteau vs. Gibson on defense of *res judicata*.

1883. 2d Monday in October. Writ of error returned to the Supreme Court of the United States, having been sued out by Chouteau, and being that to dismiss which this motion is made.

Where, in the history of judicial investigation, will you find a more protracted struggle, or one where the rights of the one party have been more persistently maintained and emphatically decided against the other, than have those of Mr. Gibson against his opponents. He confidently appeals to this Honorable National Tribunal to dismiss the writ of error of the plaintiffs, whose claims have been denounced in the State tribunals by judgment upon judgment, and who are now lurking here under the false pretense that there is here some question arising under the Constitution or laws or authority of the United States, or affecting some privilege or right granted by the United States, the determination of which is or has been necessary to arrive at the judgment rendered in the State Court.

There is no such question in this record, and Mr. Gibson asks that his title shall be finally established by this Court refusing to take jurisdiction of the cause.

JOHN W. NOBLE,

For Respondent Gibson.

John W. Noble.
Counsel for Resdt.

SUPREME COURT U.S.
FILED
JAN 28 1884
JOSEPH H. MACKENNEY, CLERK

Supreme Court of the United States.

OCTOBER TERM 1883.

CHARLES P. CHOUTEAU
AND JULIA MAFFITT,

Appellants.

vs.

CHARLES GIBSON.

MR. GIBSON'S ARGUMENT IN SUPPORT OF MOTION TO DISMISS THE WRIT OF ERROR.

References are to the top pages of the printed record.

C. GIBSON,

pro se.

Supreme Court of the United States.

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Although the reasons in support of this motion will be presented by my counsel, in whose ability I have the fullest confidence, I beg leave to give some reasons, in my own way, why it should be sustained.

This Court will no doubt prefer the statement of the case made by the Supreme Court below in its opinion (printed record p. 265,) to any statement of my own. I wish to add to it, however, the further facts that the Circuit Court (p. 35,) heard the whole case on the "pleadings, exhibits and proofs in the cause," and dismissed the bill. I will allude hereafter to some of the defenses other than that of the former recovery.

It is not, and cannot be, denied that this case is upon precisely the same claim and title, and raises precisely the same questions, which were heard and determined in the old case of Gibson vs. Chouteau. The plaintiffs' contention is that the former action was a naked ejectment, and a judgment therein was no bar, and that their answer was so general and vague as not, even after verdict, to confer jurisdiction to try their claim to the equitable right in that case, *although it was in fact* tried and decided, and, therefore, that there was no bar, and that in any event the decision of questions of law was no bar even in the same case and between the same parties.

The Supreme Court below states (p. 268,) and such is the uncontested fact, that "the record (in the original case) further shows that defendant, Chouteau, *over the objection of plaintiff*, Gibson, that the answer was not specific enough to let the evidence in, was allowed to put in evidence, in support of his equitable defense, *every deed and all the documentary evidence* which is set up in the petition in the present case as the basis of plaintiffs' equitable claim."

The same objection was again urged by me in the State Supreme Court. (See extract from my brief, p. 221, and also in this Court appellant's brief on the argument here in 1869.) So far as the equitable right is concerned, the only difference between the two suits, in substance, is in the transposition of the parties.

It is the settled principle of this Court that a judgment in ejectment is a bar, and the plaintiffs now ask this Court to reverse the Supreme Court of Missouri, for the sole reason that it holds precisely the same doctrine.

This Court in this very case and in both hearings, in 1869 and 1872, (see 8 Wal. 314 and 13 Wal. 92,) declared

that Mr. Chouteau, under the practice in Missouri, *could* set up his equitable right by way of a defense as effectually as by an independent bill.

The Supreme Court of Missouri has many times held that the answer must contain all the essentials of an independent bill. But surely I need not argue before this great tribunal that the question whether the answer does contain those statements, may be finally determined by the State Court, as such practice is purely *stateal* and not national.

Fenn vs. Holmes, 21 How., 481, which was a case in relation to this same O'Carroll tract.

But I need not wander into other pastures. This litigation furnishes its own quietus. In Gibson vs. Chouteau, 8 Wal. 314, *I was appellant*. By a mistake of the clerk below, the record proper, as so held by this Court, presented the same resulting trust and the same alleged fraud that is now presented by this bill or petition in the present case.

Although the *opinion* of the State Supreme Court was flatly in my favor on every point (and especially as to the alleged fraud), this Court held that it would not consider it at all, and it, *upon Mr. Chouteau's motion*, dismissed my first writ of error for the *sole* reason that the answer, that is, the record proper, gave jurisdiction to the State Court to hear and determine Mr. Chouteau's claim to the equitable right.

My motion now is based on the same legal grounds precisely that Mr. Chouteau's motion in that case asserted.

I am aware that Mr. Justice Field, in delivering the opinion in this same case, in 13 Wallace, states that when the defendant becomes the actor, he must state his defense with the same particularity as he should state his case in an independent bill, and he cites Maguire vs. Vice.

No allusion is made by him to the peculiar statutes of Missouri relating to the New Madrid titles, and which repeal the rule in Maguire vs. Vice as to them, as is so ably shown by Mr. Chouteau's lawyers at the first argument in this Court. (See Glover & Shepley's brief in this printed record, pp. 216 and 217.)

On the trial of the old case in the St. Louis Land Court I objected to the admission of Mr. Chouteau's evidence, on the very ground that the answer was too general and did not present the trust asserted. I was overruled, and excepted (p. 140). In the State Supreme Court (39 Mo.) my brief shows I again urged the same objection. This is the extract from it (p. 221): "No such issue was made in the pleadings. The rules of pleadings require such issues to be framed with the same particularity as bills in chancery. Carmon vs. Johnson, 20 Mo., 110; 36 Mo., 182; and 37 Mo., 461."

Appellant's brief, that is my brief, on the argument on the first writ of error, in 1869, to this Court, and which it dismissed, contains the same proposition. I was overruled in the Land Court, in the State Supreme Court and in this Court—vexed, delayed, put to the trial of the equitable right in all the Courts, my writ of error dismissed, and I was mulcted in heavy costs, for the *sole* reason that all the Courts held that the record was sufficient to confer jurisdiction over the equitable right. This present appeal is founded on the fundamental proposition that the answer and record did not give the Court such jurisdiction, and hence that there is no *res judicata*.

I did not cite Maguire vs. Vice, nor several other Missouri cases, because I supposed that Carmon vs. Johnson, and the other two cases cited by me, were sufficient, being by our own Supreme Court, and the principle of practice

not being disputed, or disputable, by any Missouri lawyer, I confess I have been unable to perceive the reason why Mr. Justice Field made this allusion.

My first writ of error being dismissed on the ground that the record presented the equitable title for trial, and the judgment below being against me, and it being affirmed, the bar against me, under the direct judgment of this supreme tribunal, was thus complete. It was only by my motion in the Court below to set aside its judgment and enter a judgmeut *nunc pro tunc*, that I avoided the bar.

The trial in this Court, reported in 13th Wallace, was on the second writ, and it was to this new judgment.

The record, or writ of error, on this second trial presented the question of limitation only.

On the second trial I bowed, as a true lawyer should, to the decision of this great Court, in 8th Wal., and treated the question as settled by it, and hence that decision was not discussed. Mr. Justice Field could not have intended to overrule that decision, for he makes no allusion to it, and he concurred in it.

The plaintiffs below, in their briefs and oral arguments, relied on this allusion as their excuse for bringing the present suit, but I never for a moment feared that so eminent a judge ever intended to hold or to intimate that a State Supreme Court might not finally determine, in good faith, whether a pleading after verdict, under its own State laws and practice, in its own Courts, and between its own citizens, was or was not sufficiently explicit to give jurisdiction of the subject matter, or that this Court would ignore its own settled doctrine that a second writ of error does not bring up questions either of fact or law which had been decided on the first appeal, or that this Court would overrule its own unanimous opinion rendered in the same case,

without making any reference or allusion to the first decision.

On the second trial in this Court, the case presented to this Court every Federal question that is now presented or ever can be asserted in any Court.

The case in brief, is this: I brought an ejectment on the title by patent, and putting the title itself in issue. Plaintiffs answerd setting up fraud, and claiming the equitable right in general terms, and asserting a resulting trust, and in their arguments, proved that the rule in Maguire vs. Vice, did not apply to the pleadings in New Madrid ejectments, and, therefore, that the Court had jurisdiction. (216 and 217.) I objected that the answer was too general to confer jurisdiction to try the contention as to the equitable right, but I was overruled by all the Courts, and plaintiffs had a full and fair trial of their claim on the merits. Judgment was, however, rendered against them on the merits. They then turned round and filed the present independent bill. Judgment was again rendered in the general form against them by the Circuit Court. It was affirmed by the State Appellate Courts on the ground that the first judgment was a bar, and plaintiffs bring a writ of error to this Court. The judgment of the Circuit Court is in the same form precisely as the judgment against me by the State Supreme Court in 1867, and which this Court in 8th Wal. held it had no jurisdiction to review, and so far as regards the question of jurisdiction, it is utterly impossible to explain how this Court could have jurisdiction to review the last judgment of the Circuit Court below, when it had none to reverse the first one against me in the State Supreme Court, and yet *that* is the judgment this appeal is brought to set aside and reverse. If both Appellate Courts were wrong as to the question of *res*

judicata, which was the only question they decided, still the judgment of the Circuit Court, which is upon *all* questions in the case, would remain.

Whatever may be the fact as to any Federal question or questions, it is absolutely certain, under the decision of this Court in 8th Wallace, that there were some controlling local questions in the case. It is also absolutely certain under that decision, that the record must show that the decision below was against the appellants on the Federal question or questions, and not upon the local questions.

One mortal blow is enough to kill a case as well as a man, and if there be one controlling local question, that is sufficient, whatever may be the error concerning any Federal question. It is also certain that neither the judgment nor the record or opinion of the Court, shows that the judgment of the *Circuit Court* was against the appellants on a Federal question, or a Federal question only.

I have been a member of this bar for a great many years. I may properly defend my honor before this august tribunal, and, therefore, I embrace this, my only opportunity, to show to the Court—as tender as it is great and powerful—that the opinion in this case in 8th Wallace, may do me possible injustice. The opinion shows that the charge of fraud was in the first judgment in my favor, but that the second judgment was against me, and might have been on any or all of the issues of which fraud was one, and, therefore, it dismisses my writ of error. It omits to state as the record proper shows, that all my evidence at the *nisi prius* trial was excluded, on the ground that there was no evidence tending to prove the allegations. (144.) It refuses to notice the opinions of the State Supreme Court, and does not state what those opinions actually were on these allegations of fraud, although they are plain enough. The reports of this

Court are the most enduring and sacred archives of the nation, and are found and read all over the continent, while the Missouri Reports are merely local.

The casual reader of the opinion, would naturally suppose that my appeal would not be dismissed without there was some foundation, or at least, that where the question involved moral character, and the acquital was in fact complete, the actual fact would likely be stated. In an age when the highest and best, with life-long characters spotless and pure, are assailed with wanton and reckless audacity, I may treat mere allegations with indifference, but not so with the slightest intimation of this Court, so careful of character, that the Supreme Court of my own State *might* even have found fraud against me. That record further showed by the deed of Mrs. MacRee to me (132), and by the depositions of Mason (144), W. G. MacRee (147) and of Mrs. MacRee (150) and my letter to Mr. Shepley (150)—this being the whole of the evidence on the point—that Mrs. MacRee gave me this land for my "zeal and fidelity" in defending her against Mr. Chouteau, in the case of Berthold *et al.* vs. McDonald, her tenant, 22 How. 334; that while that case was pending in this Court, I offered to convey my title to Mr. Chouteau, if he would stop that suit against her, in which I was her counsel receiving heavy fees; that the offer was of my own free will, and without the slightest moral or legal obligation on my part, and if the offer was accepted, I would lose my land and my fees, and would get nothing. The plaintiffs aver that the land was worth over one hundred thousand dollars. With this evidence fully before them, and in the record of the old case, the plaintiffs in their present petition make the gravest charges against me, Mrs. MacRee, and all the officers of the General Land Department, and yet upon the trial, make not the slightest attempt to prove any of them. *I* assumed the affirmative, and gave

this evidence from the old record in order to prove the averment in my answer, that those charges were wilfully false, and to bring the case within the rule established by this Court in Eyre vs. Potter, 15 How. 56. I may, without self laudation, say that it is extraordinary for a lawyer of "his own motion," without any legal or moral obligation, to offer in writing to give and convey his own land, although given to him, worth $100,000, soley in order to stop a suit in which the receipt of his fees was his only interest, and without the slightest idea of getting anything for himself in return. It is still more extraordinary after he has done so, for his adversary, with a full knowledge of the facts, to make such charges against him as are contained in this petition.

Every true lawyer and gentleman values in the highest, the respect of the judges of this great national Areopageon Court. On such ground only, I may properly refer to these record facts, but they should also be considered on this motion, for in such a case the Court will not tarry in its decision.

I pray this Court most earnestly to decide this motion *now*. This litigation has lasted more than twice as long as the siege of Troy, or the case of Warren Hastings. It has been *five* times before the State Supreme Court. This is its third time before this Court, and, throughout, the evidence was wholly documentary, with but little dispute about facts. The Courts of the State and the United States have been engaged for twenty-one years of constant and costly litigation in trying to determine whether on these certain records and documents I or the plaintiffs own this land.

This Court postponed Mr. Chouteau's motion until the hearing-in-chief in 1869, and after I was put to all the expense and delay of a regular argument on the whole case, it

sustained the motion. It would have been better for both parties, as well as the Court itself, if it had decided it when filed.

In conclusion, I would respectfully refer to the briefs of Messrs. Glover & Shepley and Hill, the attorneys of these plaintiffs, now on file in this Court, in support of *their* motion to dismiss my writ of error in the old case, and I adopt them as my own in support of this motion. They were sufficient to prove to this Court, as against me, that it had no jurisdiction of these questions then, and they will accomplish the same end now in my favor.

Delay may be so long as to amount to a denial of justice. I pray the Court to decide the question of jurisdiction now.

C. GIBSON,

pro se.

John W Noble.
Counsel

FILED
FEB 9 1884
JAMES H. McKENNEY, Clerk.

111-200

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

CHARLES P. CHOUTEAU, and
JULIA MAFFITT,
Plaintiffs in Error,

vs.

CHARLES GIBSON,
Defendant in Error.

Error to the Supreme Court of the State of Missouri.

Motion of Defendant in Error to Dismiss the Writ for Want of Jurisdiction.

ARGUMENT IN OPPOSITION TO THE MOTION.

By THOS. T. GANTT,
Of Counsel for Julia Maffitt, one of Plaintiffs in Error.

Pierce Bros., Printers, 118 North Third Street, St. Louis.

In the Supreme Court of the United States.

CHARLES P. CHOUTEAU, and
JULIA MAFFITT,
Plaintiffs in Error,

vs.

CHARLES GIBSON,
Defendant in Error.

(Error to the Supreme Court of Missouri.)

ON MOTION TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

Ordinarily, the argument of such a motion would not require, and therefore would not justify, an examination of the whole record. But in the present case this is unavoidable. Only in this way can it be discovered on what considerations the judgment of the State Court was founded; and without further preface, the undersigned proceeds to show what legal propositions were presented to the State Court: what disposition that court made of each of them; and that the determination of each involved the construction of an act of Congress, under and by virtue of which the plaintiffs were clothed with an equitable title. An abstract of the record, as brief as is consistent with the clear presentation of these points, will first be made; and then will follow the demonstration that throughout, the State Court, denying the prayer of the plaintiffs in error, misconstrued the federal law.

James Y. O'Carroll was the original owner of one thousand arpents of land in New Madrid County, Missouri, and by mesne conveyances, all his interest had come to James Tanner, in and prior to 1818. In 1811 the land had been materially injured by earthquakes, and under the act of February 17, 1815, this injury having been proved before the Recorder of Land Titles, New Madrid Certificate No. 150, dated November 30, 1815, was issued to "James Y. O'Carroll, or his legal representatives."

In 1818, Tanner conveyed the land in New Madrid County, to Christian Wilt, of St. Louis, with covenants for title, and with a special covenant to further assure to Christian Wilt, or his assigns, the title to any land that might be located in lieu of it by virtue of New Madrid Certificate No. 150.

On June 16, 1818, Christian Wilt, as representative of O'Carroll, gave notice of the location of this certificate on a tract of land, which the United States surveyed in the same year. This survey was numbered 2,498; was of irregular shape; and contained 640 acres.

Christian Wilt was a St. Louis merchant carrying on business here under his own name. In fact, however, he was in partnership with Joseph Hertzog, of Philadelphia, who furnished all the capital of the firm. The purchase of this claim from Tanner had been made with partnership funds and on account of the partnership. Wilt died in 1819. Thereupon Hertzog came to St. Louis, took charge of the assets of the firm as surviving partner, and on October 22, 1822, executed to Robert Wash a deed conveying to him, amongst other things, the land within survey 2,498, in trust to secure a debt due to a person named Devotion. The debt remaining unpaid, Wash, on October 27, 1824, reciting the deed of trust, and that, in pursuance of it, he had sold to P. Chouteau, Jr., 64 acres from off the westernmost part of the tract, conveyed to P. Chouteau for the consideration of $128, the said tract of 64 acres. This deed is recorded in Book M, p. 172, of the Recorder's office of St. Louis. Chouteau took immediate possession of the land conveyed

to him and remained in possession until 1872. Henry Clay, executor of James Morrison, obtained judgment against Hertzog, surviving partner of Wilt, and under an execution issued December 24, 1824, purchased the whole of survey 2,498 for $450. The sheriff's deed to Clay was executed May 17, 1825.

Henry Clay filed a bill on the equity side of the St. Louis Circuit Court on October 20, 1829, against the heirs and legal representatives of Christian Wilt, setting forth the partnership of Hertzog and Wilt; the carrying on of the business under the name of Wilt; the purchase of the land located by New Madrid Certificate No. 150, issued to the legal representatives of James Y. O'Carroll, and other land by Christian Wilt, with the partnership funds, and on account of the firm; the death of Wilt in 1819, leaving an only child, Geo. W. Wilt; the acquisition by Clay of all the title of Hertzog, surviving partner, in and to the tract of 640 acres in satisfaction of a partnership debt; and the equity of the complainant to have the title of Wilt's heirs; also stating that Geo. W. Wilt had died in infancy, naming his heirs, who were all non-residents, and asking that they, together with R. Wash, to whom as trustee for Devotion, Hertzog had conveyed this tract of 640 acres, should be made parties to the bill, and all their title, etc., vested in complainant. Due process was issued, publication was made, and all the defendants being before the court, a decree was made at the March term, 1832, vesting in Henry Clay all the title of defendants, who were the legal representatives of Christian Wilt, to the land within survey 2,498

Some time between 1829 and 1832 Henry Clay had received from William MacRee the sum of five hundred dollars, and agreed to convey to him this tract of land. William MacRee died in 1832, intestate and without issue, leaving his mother, Ann F. MacRee, and his two brothers, James F. and Samuel MacRee, his heirs at law. On July 4, 1836, Ann F. and James F. MacRee released to Samuel MacRee, with covenants for further assurance, all their interest in

this land, and on October 11, 1839, Henry Clay, reciting his agreement with William MacRee, conveyed this tract to Ann F., James F., and Samuel MacRee.

By a deed dated August 30, 1838, acknowledged October 31, 1839, and recorded November 8, 1839, Samuel MacRee and wife, in consideration of $150 to them paid by Pierre Chouteau, Jr., " bargained, sold, released, quit-claimed and conveyed " to Pierre Chouteau, Junior, of the City of St. Louis, and his heirs, a tract " beginning on the eastern line " of the League Square, granted and confirmed to Charles " Gratiot, at a point where the southern line of the land " confirmed to Susan Dubreuil intersects the said line of the " League Square; thence with the line of the said League " Square south 8 degrees, 40 minutes west, 48 chains, to a " point in said line, corner of Susan Jannette's claim; " thence south 83 degrees 30 minutes east, 13 chains, 64 " links, to a post; thence north 8 degrees, 40 minutes east, " 45 chains, 97 links, to a post; thence north 75 degrees " west, 13 chains, 70 links, to the beginning, containing the " quantity of 64 acres, being part of the tract located under " New Madrid certificate issued to James Y. O'Carroll or " his legal representatives, to be taken off the western end " of said tract, and is the same parcel of land conveyed to " said Pierre Chouteau, Jr., by Robert Wash, as trustee of " Joseph Hertzog, by deed, recorded in the recorder's " office of St. Louis County, book M., p. 172 and follow- " ing: To have and to hold the above described tract of " land to the said Pierre Chouteau, Jr. and his heirs for- " ever." This is the land in controversy.

Survey 2,498 was returned to the recorder of land titles on August 10, 1841. On August 16, 1841, patent certificate No. 447 was issued thereon to "James Y. O'Carroll or his legal representatives."

In 1844, Samuel MacRee filed a bill on the equity side of the St. Louis Circuit Court, stating that Henry Clay, executor of Morrison, had obtained judgment against Hertzog, surviving partner of Wilt, and had sold this land thereun-

der, and that the title thus acquired had come (as herein above shown) to Samuel MacRee. That thereby "the equitable title to said tract had unquestionably vested in complainant, and that he was entitled to call for the legal title;" that George Wilt was dead, leaving certain heirs at law, against whom process was prayed. Due publication was made, and an interlocutory decree, made final in 1848, was obtained, vesting in Samuel MacRee all the title to the location of which Christian Wilt had died seized.

In July, 1849, Samuel MacRee died, having by his will made his wife, Mary MacRee, his sole devisee. In 1861–2 steps were taken to procure a patent for survey 2,498, and a patent was issued dated June 10, 1862, granting "to "*Mary MacRee, assignee, in right of the said James Y.* "*O'Carroll, in virtue of deraignment of title, and to her* "*heirs*, the tract of land described in the aforesaid survey "2,498, excepting," etc.

The patent recited survey 2,498 at length. The exceptions are common field lots, and part of the St. Louis common.

On March 26, 1862, the Surveyor General had ordered that "the transcript plat of survey 2,498, in the name of "James Y. O'Carroll or his legal representatives, under "New Madrid certificate No. 150," transmitted by the Sur- "veyor General to the recorder of "land titles on August "10, 1841, being erroneous in omitting to show the inter- "ferences of other surveys with the same, and being "superseded by the correct plat of said survey returned to "the recorder on March 26, 1862," "on which a new "patent certificate and a patent to Mary MacRee had been "issued, be, and the same is hereby set aside, cancelled and "annulled."

In December, 1862 (day not stated, but certainly between five and six months after the issue of the patent), the United States Recorder of Land Titles made an order setting aside patent certificate No. 447, issued on August 16, 1841, in the name of James Y. O'Carroll, original claimant under United States

Survey No. 2498, under New Madrid certificate No. 150, for 640 acres. This order appears to have been filed by Charles Gibson in the General Land Office on January 9, 1863, and the Commissioner on that day notified the recorder of this, and of the issue of a new patent certificate, No. 494, in lieu thereof. On March 2, 1863, the Assistant Secretary of the Interior again, at the instance of Charles Gibson, formally approved all this work. On the 8th of August, 1862, Mary MacRee conveyed, by quit-claim deed, to Charles Gibson the tract of 64 acres above described, particularly stating that it was "all that portion of said survey 2498 now or heretofore in possession of or claimed by Pierre Chouteau, Jr., or Charles P. Chouteau, or the representatives of them, or either of them." This deed is declared to be made "as an evidence of 'the appreciation' by Mary MacRee 'of the zeal and fidelity manifested by Gibson in her cause.'"

On September 23, 1862, Charles Gibson commenced an action in the St. Louis Land Court alleging: *First*, That Pierre Chouteau, Charles P. Chouteau and John Cook were, on August 20, 1862, in possession of the tract of 64 acres (describing it). *Second*, That prior to August 20, 1862, Mrs. Mary MacRee was by the United States invested with the title to the said premises, and had conveyed the same to the plaintiff. *Third*, That plaintiff was entitled to the possession of the premises, and that defendants withheld the same from him to his damage; wherefore he sues.

Charles P. Chouteau denied that he was in possession as charged, and as to him the suit was dismissed. Cook was tenant of Pierre Chouteau, who answered denying that he unlawfully withheld from plaintiff the possession of the premises; denying that plaintiff was legally entitled to such possession; and denying the joint possession of himself and the other defendants.

2. He denied that prior to August 20, 1862, Mary MacRee was invested by the United States with the title to the premises sued for.

3. He ignored any conveyance from Mrs. MacRee to plaintiff.

4. He set up forty years adverse possession.

5. He alleged that any deeds obtained by Gibson from Mrs. MacRee were so obtained while Gibson was agent and attorney for defendant.

To this answer there was a replication, and the cause was tried by the court sitting as a jury in January, 1865. After the evidence was put in, the court declared the law to be that: "The effect of the patent issued by the United States "to Mary MacRee was to invest her with the legal title to "the land in dispute; and the title vested in the plaintiff, "through the deed to him from Mary MacRee, is superior "to any title shown by the defendant to the land in ques- "tion under New Madrid Certificate No. 150; and said "patent having issued to said Mary MacRee within ten "years next before the commencement of this suit, the "possession of said defendant is no bar to the plaintiff's "recovery," and thereupon made a finding, and gave judgment as follows:

"January 28, 1865, October Term, 1864—and now again "at this day come said parties, by their respective attor- "neys, and the court being now fully advised of and con- "cerning the premises, finds the issue therein for the plain- "tiffs, and doth assess the damages at the sum of six hun- "dred dollars, and the monthly value of the rents and "profits of the premises sued for at fifty dollars. It is "therefore ordered and adjudged by the court that the "plaintiff recover of said defendants the possession of the "following described real estate in the county of St. Louis, "to-wit: All that portion of United States Survey 2498," etc. (describing it), "which portion contains sixty-four acres, "more or less, and also the damages and monthly value "aforesaid, in form aforesaid, as assessed, together with "his cost and charges herein expended, and that he have "execution therefor." On appeal to the Supreme Court

of Missouri, this judgment was reversed, that court in its opinion declaring:

1st. That at the time when Samuel MacRee and wife, by deed, acknowledged October 31, 1839, conveyed this tract of 64 acres to P. Chouteau, Jr., there was not, in the legal representative of James Y. O'Carroll, any title or interest whatever, legal orequitable, complete or *inchoate* to the land within survey 2,498. Hence, that the deed then executed, being one of quit-claim only, passed nothing; and that the title subsequently acquired by the devisee of Samuel MacRee, by the patent, did not enure to the benefit of his vendee, in 1839. But,

2d. That the possession of the tract from 1824 to 1862 by Chouteau, with claim of title, barred the action of those claiming under the patent, issued in 1862.

On writ of error the Supreme Court of the United States reversed this judgment on the second point only. It refused to consider the other question, saying, that in order than an equity should be considered as a defense to a legal title, it was necessary that it should be set forth in the pleadings according to chancery forms, and as this had not been done, no evidence relating to it could be heard or considered.

When the case came back to the Supreme Court of Missouri, Gibson moved for judgment, affirming that of the land court. Defendants, heirs of Pierre Chouteau, (who had died since 1862), moved for leave to answer, setting up their equities, and also called the attention of the court to the fact that certain parts of the 64-acre tract were excepted from the grant of the patent. As to these parts, Gibson withdrew the action, and renounced all claim to the damages assessed by the Land Court; and thereupon the Supreme Court gave him judgment for the possession of the residue of the tract. This was in 1872.

Gibson, by writ of possession, immediately took possession of this residue, and within a few days thereafter commenced a new ejectment for the part of the tract as to

which he had withdrawn his claim in the Supreme Court, and the heirs of Mr. Chouteau filed their bill to have Gibson declared to be their trustee as to the tract of 64 acres. This bill is the commencement of the present suit.

In it, stress was laid on the irregular and unusual steps by which an attempt had been made to set aside the patent certificate issued in 1841, to disconnect Mary MacRee from Samuel MacRee, her devisor, and from James Y. O'Carroll, the original proprietor of the land injured by earthquakes, and to issue the patent to her directly. It was alleged that all this was done in order to injure Pierre Chouteau, Jr., who claimed under her devisor.

It was then urged that whereas Samuel MacRee had, on October 31, 1839, after he had become clothed with all the title, claim, right and interest in and to the land embraced in survey 2,498, which was afterwards ripened into a legal title by a patent issued on June 10, 1862, directly to his devisee, sold the tract of 64 acres for full value to Pierre Chouteau, Jr., and whereas Samuel MacRee, dying in 1849, devised all his interest in the whole tract to Mary MacRee, who in 1862, procuring, through the machinations of Charles Gibson, the issue of a patent directly to herself for the whole tract located by the New Madrid certificate, had conveyed to her confederate, Gibson, by quit-claim, "in consideration of his zeal and fidelity in her cause," all her title and interest in this tract of 64 acres, described in the deed as being now or lately in the possession of or claimed by P. Chouteau, Jr.; therefore, the vendee, for value, of Samuel MacRee, asked that the grantee, with full notice, of the devisee of Samuel MacRee, should be held as a trustee for the vendee, for value, of Samuel MacRee.

In his answer, Gibson denied every allegation of the bill, even specially traversing the issue to the legal representatives of James Y. O'Carroll, of New Madrid certificate No. 150. He went on to allege that Samuel McRee, in 1844, having been advised by his counsel that he had *no title of any kind to the land located by New Madrid certificate No.*

150, filed his bill in equity and obtained the decree, hereinbefore stated. That the consideration of the conveyance to him, in 1862, of this tract of 64 acres, was professional compensation for his services in defending a suit brought against her by plaintiff, reported in 24 Mo. 126. He then set forth the proceedings in the action of ejectment commenced in 1862, and alleged that this constituted *res judicata*, and constituted a bar to the maintenance of this suit.

He set up other matters, also, in his answer, but as no evidence was given in relation to them, and as the action of the State Court disregarded them altogether, it is deemed improper to further refer to them.

The Circuit Court dismissed the bill; the St. Louis Court of Appeals affirmed its judgment, being of opinion that, though there was no bar by reason of *res judicata*, forasmuch as the equities had never been adjudged, yet, assuming the law to be as declared in the opinion of the Supreme Court in the ejectment suit (39 Mo., 567), it was plain that plaintiff had no equity. Deferring to the *authority* of that *opinion*, therefore, the St. Louis Court of Appeals affirmed the judgment of the Circuit Court.

On appeal to the Supreme Court of Missouri, that tribunal affirmed this judgment, declaring in its opinion that the prayer of the complainants must be denied, and the judgment of the Circuit Court affirmed, because of the proceedings in the action of ejectment. Instead, however, of recognizing in those proceedings, as the Court of Appeals had done, an authoritative declaration of the law, it declared the *opinion* of the court in that case to be *res judicata;* that is to say, it declared the *reasons* given by the Supreme Court of Missouri for affirming the judgment in ejectment, which had been expressly rendered on the legal title alone, to be an adjudication of the equities, of which, in the same case, the Supreme Court of the United States declared that they were not presented for adjudication.

So that it appears that, in the eyes both of the St. Louis Court of Appeals and of the Supreme Court of Missouri,

it was the *opinion* of the Supreme Court of Missouri in 39 Mo. Reports which compelled the denial of the prayer of complainants, now plaintiffs in error. The St. Louis Court of Appeals regarded that opinion as an authority which *it* was not at liberty to gainsay. The Supreme Court of Missouri appears to have considered the *opinion*, as the *judgment* of the court, in the case.

So that complainants, claiming an equitable title under the laws of the United States, are repulsed from the courts of the State because of what occurred in the course of a trial of the legal right to the possession of the disputed premises. In that ejectment they were adjudged not to have the legal right to the possession; and the record was in such a condition that, in the opinion of the Supreme Court of the United States (13 Wallace, 92, and following), the equities were not examinable. Whereupon, they frame their prayer for the equity in a formal manner; but are told that what occurred in the action of ejectment constitutes a conclusive reason why this prayer should be denied. The Court of Appeals says that in the course of that ejectment trial views were expressed by the court of last resort, demonstrating the opinion of that court to be that complainants have no equity. Relief is therefore denied on the *authority* of those views. The Supreme Court of Missouri says that these views are what *it* understands that jurists intend, when they speak of *res judicata;* that *res judicata* is a conclusive, unquestionable, irreversible and unimpeachable matter; assumes that all which is predicable of the conclusiveness of a *judgment* is true also of the *reasons* given for that judgment; quotes copiously from text-writers to show that a judgment in any case is, as to the subject-matter of it, a finality (which no one that we are aware of, and certainly not the complainants, now plaintiffs in error, ever thought of denying,) and then springs across a chasm, impassable by any logical bridge, to the conclusion that *because* reasons, on the face of them erroneous, were given for a right judgment in ejectment, therefore these erroneous reasons are

sanctified and validated forever when complainants seek to enforce an equity against the allowance of which nothing but these erroneous reasons can be urged.

The plaintiffs in error thereupon assign the following as the errors committed in this cause by the Supreme Court of the State of Missouri, that is to say—

First. That the Supreme Court of the State of Missouri erred in deciding that, under the statutes of the United States, no interest whatever, *inchoate* or complete, legal or equitable, in the land in controversy, vested in the legal representatives of James Y. O'Carroll, prior to the return of survey 2,498 of the location made under New Madrid certificate No. 150, to the office of the recorder of land titles and his issue thereon of patent certificate No. 447.

Second. That the Supreme Court of the State of Missouri erred in deciding, that prior to such return, no transfer, sale, assignment or conveyance by the owner of the certificate of the land embraced within such survey, could, although the location was afterwards perfected and a patent issued thereon, operate to pass to the transferee, vendee, assignee or grantee of the land any interest therein.

Third. That the Supreme Court of the State of Missouri erred in deciding that where the initial steps had been taken under the law of the United States to obtain the title to a tract of land, and the person taking such initial steps had, for value, sold, transferred, conveyed and delivered possession of such land to another (such sale and transfer not being forbidden by law), and the title was afterwards perfected, the vendee or transferee who had, for the period of more than twenty years next after such sale and transfer prior to such perfecting, uninterruptedly possessed, occupied and improved such land, acquired no interest, legal or equitable, therein, but was liable upon the issue of the patent to be evicted therefrom as a trespasser, by the devisee of such vendor.

Fourth. That the Supreme Court of the State of Mis-

souri erred in deciding that there was any evidence whatever in support of defendant's plea of *res judicata* (so-called).

Fifth. That the Supreme Court of the State of Missouri erred in deciding that the matter of plaintiff's petition or bill of complaint in this cause had been adjudicated in the ejectment suit of Gibson v. Chouteau (reported 13 Wallace, U. S. S. C Rep., p. 92, and following).

Sixth. That the Supreme Court of the State of Missouri erred in deciding, after the ejectment suit of Gibson v. Chouteau (13 Wallace, 92), had been heard in this high court, and this court had remanded the same, declaring amongst other things, that the equitable title of Chouteau and his heirs, under the laws of the United States, *had not been* presented, by the record, for examination and adjudication, that such equitable title *had been* presented by the record and *had been* adjudicated: thus disregarding and reversing the ruling of this high court therein, and pretending that the opinion of itself (the Supreme Court of the State of Missouri) concluded all controversy, superseded all argument, and constituted what said Supreme Court of the State of Missouri was pleased to term *res judicata*.

Seventh That the Supreme Court of the State of Missouri erred in confounding an opinion by it given in 1866, respecting the interpretation of the statutes of the United States (which opinion was and is not only in conflict with numerous other opinions of the Supreme Court of Missouri, both before and since 1866, but is in flat contradiction of the uniform course of the decisions of this high court) with *the judicial determination of a matter of fact, properly in issue* between litigant parties.

Eighth. That the Supreme Court of the State of Missouri erred in deciding that an opinion upon a *matter of law*, delivered during the trial of an action of ejectment, was equivalent to, and identical with, the judicial determination of a *matter of fact* between litigant parties.

Ninth. That the Supreme Court of the State of Missouri

erred in refusing to the plaintiffs, who showed themselves clothed with an equitable title, under the laws of the United States, to the land in controversy, the benefit of that equity, on the ground and pretense that the said equity had been already adjudged against plaintiffs in a certain cause, although this high court had expressly declared, in the very case cited by the Supreme Court of the State of Missouri as showing that said equity had been adjudged, that this equity had not been presented at all, and was incapable of adjudication therein.

Tenth. That the Supreme Court of the State of Missouri erred in refusing to the plaintiffs the equitable relief to which they showed themselves entitled under the laws of the United States, and in not entering a decree in their favor accordingly.

From what precedes, it will have been seen that Pierre Chouteau, the ancestor of plaintiffs in error, had, in 1839, become the purchaser, for value, and had taken a formal assignment of all the equitable interest which Samuel MacRee, and Mary, his wife, had in a tract of sixty-four acres of land, the northwest part of a large tract of 640 acres, located by New Madrid Certificate No. 150, issued in 1815, to James Y. O'Carroll, or his legal representatives. Chouteau had, in 1824, purchased the same tract of sixty-four acres, from the same person through whom MacRee claimed the whole 640 acres; he had gone into possession at the date of the first purchase, and the deed to Chouteau from MacRee and wife, in 1839, was in express confirmation of the deed of 1824. The deed of MacRee and wife in 1839, contained no covenants of warranty, but it purported to convey to P. Chouteau and his heirs, for $150, a tract of land described as "containing the quantity of sixty-four acres, being " part of the tract located under a New Madrid certificate, " issued to James Y. O'Carroll, or his legal representatives, " to be taken off the western end of the tract," and as be-

ing "the same parcel of land conveyed to said Pierre Chou-
"teau, Jr., by Robert Wash, as trustee of Joseph Hertzog,
"by deed recorded in the recorder's office of St. Louis
"county, book M, p. 172, and following. To have and to
"hold the above described tract of land to the said Pierre
"Chouteau, Jr., and his heirs, forever." Chouteau remained in possession of this land from 1824 until he was evicted in 1872, by ejectment.

In 1849, Samuel MacRee died, having constituted his wife his sole devisee. No patent had been issued for this location, and the survey of it had not been formally returned to the recorder of land titles until August, 1841. In 1862, steps were taken which resulted in the issue of a patent directly to Mary MacRee, instead of to the legal representatives of James Y. O'Carroll. The date of this patent was June 10, 1862. In August, 1862, Mary MacRee conveyed by quit claim to Charles Gibson the tract of 64 acres which had been sold and conveyed by herself and her husband in 1839 to Pierre Chouteau, Jr. The deed particularly describes the tract as then in the possession of Chouteau, and declares that the conveyance was made to Gibson on recognition of his fidelity and zeal as her agent. All the steps resulting in the final issue of the patent as aforesaid were taken by Gibson on her behalf. He acted as her agent throughout.

In September, 1862, Gibson sued Chouteau in ejectment in the St. Louis Land Court. Chouteau set up none but legal defenses. The judge of the Land Court, expressly declaring that nothing but the legal title was before him, held that Gibson had the legal title, that defendant could not avail himself of limitations, and gave judgment in his favor accordingly for the possession of the tract and damages, pursuant to the statute of Missouri regulating the practice in ejectment. Chouteau appealed to the Supreme Court of Missouri, which, at the October term, 1866, affirmed the judgment of the Land Court. The reasons assigned for this affirmance were not those for which the Land Court had given the judgment. The Supreme Court

examined the equities of Chouteau, which had not been pleaded, and which were not, in fact, open to judicial examination; declared them to have no merits, and for this reason affirmed the judgment at law, not altering it in any respect or making any decree disallowing the equities of Chouteau. At the same term (October, 1866,) Chouteau, having employed additional counsel, a motion for a re-hearing was made, founded on the legal defense of the long possession of Chouteau. This motion was allowed at the March term, 1867, and the Supreme Court of Missouri reversed the judgment of the Land Court on the question of limitations alone. Gibson took the case to the Supreme Court of the United States by writ of error. It was decided in 1872 (13 Wallace, p. 92, and following). The Supreme Court of the United States was of opinion that the St. Louis Land Court was right and the Supreme Court of Missouri wrong, in respect of the law; that limitations did not begin to run until the patent issued. As to the other matter discussed by the Supreme Court of Missouri at the October term, 1866, (in an opinion which, in March, 1867, that same court wholly abandoned) the Supreme Court of the United States pointedly refused to look at, or express an opinion on it at all, assigning as a reason for its refusal that these equities were not *sub judice:* that to make them examinable at all they must be formally pleaded, and that until thus formally pleaded a court of equity was not possessed of them, citing for this conclusion repeated decisions of the Supreme Court of Missouri. The case went back to the Supreme Court of Missouri with the mandate of the Supreme Court of the United States. There the heirs of Chouteau (their ancestors had died during the litigation) moved for the remanding of the cause to the Land Court, with leave to them to set up their equity. They also called the attention of the court to the fact that the judgment of the Land Court had been for the whole tract of 64 acres, part of which lay within the Common Field, and had been confirmed by the Act of June 13, 1812. Gibson, at the same time, moved for the affirm-

ance, *in toto*, of the judgment of the Land Court. The Supreme Court was of opinion that the judgment of the Land Court was erroneous as to the interferences of the Common Field lots, and required Gibson to abandon his claim to these and to all the damages, which he did by a *retraxit* in open court. Then the court declared in its opinion, in answer to the prayer of Chouteau's heirs to remand the cause for a presentment and trial of the equities: "There is obviously nothing more for this court to decide, or for any court to retry that is not *res adjudicata*." If this declaration was made through a failure to understand the plain intimation made by the Supreme Court of the United States (13 Wall., 102, 103,) there is some excuse for it.

Thereupon the heirs of Chouteau, in obedience to that intimation, thus disregarded by the Supreme Court of the State of Missouri, framed their formal application for equitable relief, and commenced the present action in the St. Louis Circuit Court. That court dismissed their petition, and they appealed to the St. Louis Court of Appeals—an intermediate appellate court created in 1875. That court examined the questions somewhat elaborately, and, it is believed, with much ability. It was of opinion that the equities of Chouteau had not been adjudicated in the ejectment suit, because they had never been presented to the judicial cognizance of the court. But it was also of opinion that if the views taken of those equities, in the opinion in 1866 (39 Mo., above quoted), were correct, then these equities had no existence, and however clearly and formally presented, must be disallowed. It treated that opinion as a *direct authority*, proceeding from a court of paramount jurisdiction, as far as it, the Court of Appeals, was concerned, and for this reason, and this alone, it affirmed the judgment of the Circuit Court.

The heirs of Chouteau appealed to the Supreme Court of Missouri. That court (see its opinion) declared that these equities were *res judicata;* that they had been passed upon and adjudicated, and that they could not be re-examined.

For proof of this assertion, it referred to the proceedings in the ejectment suit.

The present motion to dismiss forces upon this high court the examination of the true effect of this ruling, and if I succeed in showing that the St. Louis Court of Appeals was right in declaring that there was no such thing in the case as *res judicata;* that the Supreme Court of Missouri was wrong in supposing that the equities of complainants had been adjudicated at all, and that the disquisitions indulged in by that learned body in 39 Mo., 536, and following, were flatly erroneous, doing violence to the uniform course of decisions, not only of the Supreme Court of Missouri, but of the Supreme Court of the United States, on points of which the latter court has ultimate jurisdiction, it will have been demonstrated, not only that the Supreme Court of Missouri erred in affirming the judgment of the St. Louis Circuit Court, dismissing complainant's bill, but that in so doing, it disallowed a right and denied a title conferred on them by the laws of the United States.

The formal assignment of errors is intended to cover all the grounds of objection to the action of the State court; and in my anxiety to omit nothing which is relevant, I may have been guilty of redundancy. I hope to avoid this fault in the argument which follows. I propose to confine myself to the establishment of ~~the~~ three principal propositions, which, unless I mistake, embrace all the points made in the assignment of errors, but the discussion of which, as here formulated, will enable me to avoid repetition. These propositions are:

1. That the equitable rights of Chouteau were not adjudged in the ejectment suit, and indeed were incapable of adjudication.

2. That, as an authority, the opinion in that case is completely worthless, being opposed to the whole current of State and Federal decisions, both before and since 1867.

3. That throughout its rulings in this cause, the Supreme

Court of Missouri has denied rights accruing to plaintiffs in error under the laws of the United States; its rulings, indeed, consisting in a misinterpretation of these laws.

The first proposition suggests three inquiries, viz: (*a*) What was decided in the ejectment suit? (*b*) What was the legal significance and effect of the ejectment record, and of what, by the most latitudinarian and indulgent construction, is that record the evidence? (*c*) What do jurists understand by the term *res judicata?*

Conceding that the finding by the land court embraced all the issues except that on the point of adverse possession, it will result that the following matters of fact were judicially determined at the trial of the ejectment in January, 1865, viz:

1. That Gibson was, at the commencement of the action, and at the trial, legally entitled to the possession of the land.

2. That Chouteau unlawfully withheld that possession from him.

3. That prior to August 20, 1862, Mary MacRee was, by the United States, invested with the title to the tract sued for.

4. That, before the commencement of the action, she conveyed that title to Gibson.

5. That the deed or deeds obtained by Gibson for the land, were not obtained by him as agent or attorney for Chouteau. It has already been said that the Land Court declared the law of the case in a form familiar to the practice in Missouri, and there called an instruction, even when, as in this case, a jury was waived, and the trial of the facts submitted to the court. It ruled that: "The effect of the "patent issued by the United States to Mary MacRee, was "to invest her with the *legal title* to the land in dispute; "and the title vested in the plaintiff through the deed to "him from Mary MacRee, is superior to any title shown by "the defendant to the land in question under New Madrid "Certificate No. 150; and said patent having issued to said

"Mary MacRee within ten years next before the commence-
"ment of this suit, the possession of said defendant is no
"bar to the plaintiff's recovery." This *instruction*, or *declaration of law*, rendered any finding as to adverse possession unnecessary.

The finding and judgment of the Land Court have been already shown.

The only matters of facts examinable under the pleadings are disposed of by this finding and this instruction; for there was not any contest at the trial as to any auxiliary matter of fact, which being hypothetically stated in an instruction, could be regarded as found either way by the verdict. The judgment is in form rigorously one in ejectment, awarding to the plaintiff the *possession* of the land, and damages for the withholding of that possession. This has been the form of a judgment in ejectment ever since 1807; ever since Missouri, either as a Territory or a State, had laws of its own. The action of ejectment was commenced in 1862, and the trial was had in 1865. The statute in force at both dates is to be found in the Revised Statutes of 1855, title Ejectment, page 688, chapter LVIII, §§ 1, 4, 6, 15 and 17. In the whole record as it left the land court, there is no hint or suggestion of, nor any reference to, an equitable title. In its declaration of the law applicable to the case, the court is careful to say that it is dealing with the "legal title" only. This declaration is the more significant when we look at the opinion so remarkably confirmatory of it, expressed by the Supreme Court of the United States in this cause (13 Wallace, 92, and following) which, indeed, affirmed the judgment of the Land Court on all points.

Surely, when, the task proposed being to inquire what has been *adjudged*, we have examined the pleadings (which are the statements of the parties as to their respective rights, claims and defenses), together with the finding of the facts (*res judicata*) and the judgment of the court upon these facts, we have omitted nothing which can assist the

performance of the task. If we find nothing in the pleadings bringing equitable rights before the court, and no trace of an adjudication upon anything but legal rights, we are most rigorously justified in saying that no equities have been judicially before the court, and consequently that they *cannot have been* judicially determined.

Nevertheless, it remains undeniable that the Supreme Court of Missouri did, in its opinion rendered in May, 1882, declare that it appeared from the record of this ejectment, *that these equities had been adjudged*. What is the explanation of this extraordinary declaration?

It is plain that the Supreme Court of Missouri in so declaring, supposed the *opinion*, expressed by a court on a question of law, to be what lawyers understand when the expression *res judicata* is employed; and that if, at the trial of an ejectment for the determination of the right of possession to land for a fleeting instant, any *opinion* as to the right of either party to the fee be expressed, both parties are concluded by that expression—that the rights of each are *adjudged*, or, as the Supreme Court of Missouri said, have become *res judicata*, and are to be considered as forever settled by such intimation.

Assumptions like these justify plaintiffs in error in exploring the meaning of this cabalistic term. No one is more conscious than the undersigned of the impertinence of making such an examination before a learned court, but the apology for so doing will be found in the misconception on this subject of one tribunal of high rank, and no small reputation for ability and learning.

Res judicata, then, we submit, means the *matter of fact* adjudged, or *judicially determined*, by a competent court in a controversy between two parties. The function of a court is to decide controversies between parties. It sits to decide *cases* or *disputes*, not to promulge abstract legal principles. Its duty is first to determine disputed facts. When this determination is made, the facts become *res judicata*, and the court must then, by applying settled princi-

ples of jurisprudence to these facts, deduce the judgment.

To every case there must be two parties. At law these are called plaintiff and defendant; in equity, complainant and respondent. In either system several persons connected together by their rights or liabilities may be grouped on either side of the controversy.

What that controversy is may admit of endless variety. The plaintiff may allege that defendant owes him so much money for property sold, and ask judgment for the amount. The defendant may deny the sale altogether; or, admitting it, may allege that he has paid the price, or that something valuable, different from money, has been delivered and received in satisfaction of the demand; or that the right of action has been barred by long delay to sue. His answer sets up one or more of these facts as a defense; issue is joined and a trial of the issue or issues is had before a jury, the court sitting as a jury, or a referee. The *finding* of the *facts*, by any of these modes, determines them as between the parties, *for all time*, unless some error in law, or some misbehavior on the part of the jury or referee has intervened; the fact thus found is fixed forever. It is *res judicata*. The court, sitting as a jury, or the jury itself, or the referee, may have made a finding opposed to the evidence adduced, or may have been led into error as to the law; and sometimes newly discovered evidence may show that the finding should not stand. In all these cases the finding may be set aside and the issue retried. But, except in prescribed, orderly modes, and within limited periods, any error committed by the triers of the fact remains irreversible; the court applies to the finding the conclusion of the law; and both parties dealing with each other thereafter are compelled to treat this determination of the matter of fact as absolutely correct. If, however, upon the facts thus found, the court puts a construction and deduces a conclusion unwarranted by law, the injured party may review that ruling in an appellate court, and the correction of the error will entitle him to the true judgment of the law upon the facts found, as was done in Hurck v. Erskine, 50 Mo. 116.

If the declaration or petition had alleged that plaintiff was the owner of a horse or other property which defendant had wrongfully converted, and defendant should answer, claiming the property as his own, the verdict and judgment would conclude both parties as to the ownership of the property sued for. But it might do more than this. Whether the property belonged to the plaintiff might depend on the existence of fraud or, contrariwise, of good faith, in the making of a deed put in evidence by the plaintiff. The contest may have turned on the character of this deed. If made in good faith, plaintiff would own the property. If made frudulently, defendant would be entitled to a verdict. Under these circumstances a verdict for plaintiff would assert the good faith of the deed, as a verdict for defendant would stamp it with fraud. But this deed may have conveyed other property, real or personal, as well as the horse, etc. If a controversy should afterwards arise between the same parties as to this other property, *all dispute respecting the character of the deed is concluded by the first verdict and judgment.* In general terms, to use the language of a most accomplished, accurate and philosophical writer: "Every judgment is conclusive, as against parties and privies, of *facts* directly "in issue in the case, actually decided by the court, and "appearing from the judgment itself to be the ground on "which it was based" (Art. 41 of Fitz James Stephen's Digest of the Law of Evidence, p. 48). If the "facts directly in issue in the case," and "actually decided by the court," do not appear from the record itself, the court will admit evidence, *dehors* the record, to show what facts were decided in arriving at the verdict (Gardner v. Buckbee, 3 Con., 120; Doty v. Brown, 4 Comst., 71; Kitchen v. Campbell, 3 Wilson, 304; Betts v. Starr, 5 Conn., 550; Kent v, Kent, 3 Mass., 338; Burt v. Steinberg, 4 Con. 55; Beebe v. Elliot, 4 Barb. S. C. Rep., 35; Miles v. Caldwell, 2 Wall., 35). In the case last cited, the facts were that Miles had obtained judgment in ejectment against Caldwell, who sought to enjoin it on account of alleged fraud in one of the

deeds through which Miles made title. At the trial of the ejectment evidence was given on the subject of this alleged fraud; and the court instructed the jury that if they believed the fraud to exist, they must find for Caldwell. They found for Miles, thus negativing the fraud. Caldwell filed his bill re-asserting this fraud. He could only have relief, if he could disregard this previous finding. Miles pleaded it as conclusive; the circuit court disallowed this plea. He then answered the bill at length; issue was joined and evidence was taken as to the fraud on both sides. The Circuit Court decreed for Caldwell. The Supreme Court, U. S., reversed the judgment. It was, indeed, of opinion that if the question of fraud or no fraud had been open, the evidence at the hearing of the equity case disproved the charge; but that fact having been put directly in issue, and determined, in the ejectment suit, it was judicially and irrevocably concluded.

The profession is familiar with the leading case of Outram v. Morewood, 3 East., 345., in which the opinion was delivered by Lord Ellenborough, Ch. J., after the cause was argued by Gibbs, afterwards Ch. J. of the Common Pleas, and Erskine, afterwards Lord Chancellor. Outram brought an action of trespass against Morewood and wife for digging coal. Defendants pleaded, showing title in Sir John Zouch, and a license from him. Plaintiff replied, showing a former recovery against the wife of Morewood, when sole. He had declared then for a similar trespass; she had pleaded title in Sir John Zouch and a license under him in the same manner and by the same instrument now relied on by her and her husband, and the verdict and judgment had been against her. Defendant demurred. The Chief Justice, in an opinion marked by great research and ability, overruled the demurrer.

But, secondly, *res judicata* is matter of *fact*. Only by the most unmeaning and licentious use (it is rather *mis*use) of language can an *opinion* be termed *res judicata*. The conclusion of the law upon ascertained facts is a *judgment;*

but the facts ascertained constitute the *res judicata*.

In the present case, plaintiffs in error challenge the inspection of the record showing the recovery in ejectment. As has been seen, the Land Court, expressly limiting its decision to the determination of the *legal title* — the only matter appearing by the record before it — gave judgment for the recovery of the possession, and there stopped. This judgment, which was really unassailable, was, at the October term, 1866, affirmed by the Supreme Court of Missouri for reasons which would excite amusement but for the disastrous consequences which succeeding courts have drawn from them. On this head, more will be said presently. What is now designed is, the formal proof that *res judicata* is matter of *fact*.

In the first place, it is, by the pleadings, set up *as a fact*. When the record isoffered in support of the plea, it is surely introduced as *evidence*. But what *is evidence?*

"The word evidence, in legal acceptation, includes the "means by which any *matter of fact*, the truth of which is "submitted to investigation, is established or disproved."

Greenleaf on Evidence, § 1. (The italics are mine.)

Starkie, after stating the manner in which *issues* are framed by the pleadings prior to their determination by the triers of the facts, proceeds thus: "That which is legally offered by "the litigant parties to induce a jury to decide for or against "the party alleging such *facts*, as contradistinguished from "all comment and argument on the subject, falls within the "province of evidence."

No more accurate and scientific writer on jurisprudence than Fitz James Stephen has enriched the literature of the profession. The opening of the second chapter of his admirable work on evidence is in these words:

"Evidence may be given in any action of the existence "or non-existence of any *fact* in issue and of any *fact* rel- "evant to any *fact* in issue, and of no others." * * * "The expression, 'facts in issue,' means—

(1.) "All *facts* which, by the form of the pleadings in "any action, are affirmed on the one side and denied on "the other.

(2.) "In actions in which there are no pleadings, or "in which the form of the pleadings is such that distinct "issues are not joined between the parties, all *facts* from "the establishment of which the existence, non-existence, "nature or extent of any right, liability, or disability, as- "serted or denied in any such case, would, by law, follow." (P. 4).

On page 2 he had defined evidence to be (1): "All state- "ments which the judge permits or requires to be made "by witnesses in court in relation to matters of *fact* under "inquiry; such statements are called *oral evidence*."

(3.) "All documents produced for the inspection of the "court or judge." (The italics are mine.)

Indeed, for what object do parties take evidence at all, or go to trial at all? To prove the *law* on any point? Not at all. The *law* is supposed to rest on fixed principles, and to be settled from the beginning; but the parties go before a jury to determine *facts* in dispute.* When this determination has been made, either by a general or a special verdict, it remains for the court to apply the known principles of law to the facts judicially ascertained by the jury, to the *res judicata*. But this is not done until the finding is purged of all impurities and imperfections; until all motions for a new trial, etc., are disposed of; and until the verdict is ratified by a judgment it has not received the seal of finality.

It appears, from what precedes, that Starkie, Greenleaf and Stephen, are in full accord in supposing that *evidence* is directed solely to the proof of *facts;* that *facts* are the only thing which can be the subject of judicial trial and determi-

* It is no exception to this remark that parties often agree upon *the facts*, and yet dispute respecting the law; and so, in inaccurate language, are said to go to trial to determine the law. When this is done, the parties do not, in strictness, *go to trial*. They *submit themselves upon the facts agreed to the judgment of the court*, however much they may see fit, and however strong may be the obligation on them, to assist the court, by research and argument, in reaching that judgment.

nation: and, by necessary consequence, that, when we see a record of any such trial and determination, we see that certain *facts* have been judicially settled and concluded. This is the whole scope and meaning of *res judicata*.

What are the facts appearing in any case, judicially determined, can be answered only by inspecting the record. Let us suppose that A sues B, alleging that B executed and delivered to him a promissory note which remains due and unpaid. B answers, denying that he executed the note. The jury finds the issue for the defendant, and the court gives judgment accordingly. The record of this suit is evidence for all time, between A and B, that the latter did not execute the note.

Or, suppose that B admits the making of the note, but alleges that he has paid it. A denies this The parties go to trial on this issue, and it is found for A, who has judgment. The record is conclusive evidence that B made the note (as he has admitted), and that he did not pay it (as the jury has found).

A has thus obtained judgment on the note. Before judgment, B owed him a debt by simple contract. After judgment, B is his debtor by matter of record. If A now sues B on the note, the answer would be that on this note B is no longer liable to A. The obligation, by simple contract, has ceased to exist, having become merged in a higher security, or, as it is expressed in law Latin, "*transit in rem judicatam*." *

Suppose suit has been brought upon a contract of which breaches are assigned. The contract may be a lease for years, reserving rent. The lessor obtains judgment for rent on this lease; obtains satisfaction; and at a subsequent time brings another action, claiming rent for a later period. As the covenant is for the payment of rent during the term,

the recovery for the rent of a particular period is no bar to an action for rent for a subsequent period, the covenant, is a continuing covenant, and the failure to pay a continuing breach. But the record of the first suit establishes beyond controversy the execution of the lease itself.

In the case of Washington, Alexandria & Georgetown S. P. Co. v. Sickles & Co., 24 How. 333, the record of a former action between the same parties was relied on as conclusive evidence of a certain contract. In the former action, there were two special counts, and also the common counts in assumpsit. A verdict was given for the plaintiff generally on December 7, 1855.

On December 14, 1855, judgment was rendered on the first count of the declaration. If the verdict had been given on the first count alone, it would have established the contract, and this effect was claimed for it. But because it was possible that the *verdict* might have been rendered on the entire declaration, and without special reference to the first count (p. 344), the court was of opinion that the defendant was not concluded. The remarks of Mr. Justice Campbell, delivering the opinion of the court, are characterized by great precision: "The judgment rendered in this suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of *all the facts* properly pleaded by the plaintiff. But when it is presented as testimony *in another suit*, the inquiry is competent whether the *same issue* has been tried and settled by it." (The italics are mine.)

This decision will illustrate well illustrates the care which should be taken not to apply a rule which precludes inquiry, unless it be quite clear that a case for its application is really made. "Every judgment is conclusive proof as against parties and privies of facts directly in issue, actually decided by the court and appearing from the judgment itself to be the ground on which it was based" (p. 48 of Fitz James Stephen's Digest of Evidence). Can it rationally be evidence of anything else? Of course, it is evidence of its own being,

but to that extent it is evidence against all the world, as well as against parties and privies (Greenleaf on Ev., § 527). But the same excellent writer remarks (§ 528) that the same principle on which judgments should be conclusive as to parties and privies "requires that the rule should apply only "to that which was directly in issue, and not to everything "which was incidentally brought into controversy during "the trial;" and he then cites with high approval what was said by Chief-Justice DeGrey in the Dutchess of Kingston case respecting the matters of which a record is evidence, which are carefully defined as "the facts or issues which have been judicially tried and determined, whether these facts or issues be one single controlling issue or several concurring to establish one main proposition."

Such are the rules of evidence respecting the matters of which a record is conclusive proof, and it may be added that such are also the rules of common sense. That which was put in issue and determined judicially is proved by it—nothing else is; nothing else, with any regard to reason or justice, can be. It would be strange—in fact, a contradiction in terms—if a matter, never *sub judice*, could be, nevertheless, *res judicata*.

We now somewhat narrow the inquiry by asking, what is proved, and what is really provable by the record in an *ejectment* suit?

It is familiar to the profession that one judgment in ejectment is no bar to another action between the same parties for the possession of the same land; and some confusion of ideas has prevailed, even among lawyers, as to the reason for what has been supposed to be a distinction in this respect between ejectment and all other actions. There are even some who regard it as an anomaly. Some have attempted to account for it by the suggestion that in ejectment the parties are fictitious. Others have supposed that it was due to the peculiar importance attached by English courts to landed property. But a very short examination will satisfy us that there is, in fact and in reality, no distinc-

tion, in this particular, between actions of ejectment and actions of assumpsit; that the circumstance of the nominal plaintiff being a mythic person, has nothing to do with the apparent distinction, and that in ejectment, as in all other actions, the facts judicially tried and determined between A and B, are settled between them conclusively and forever. The apparent distinction has been due to the failure to note what was the *matter actually put in issue*, and tried, in ejectment; in other words, what *was the subject matter* of an ejectment. When we pay careful heed to this point, we shall see that, in the language of Lord Mansfield (Aslin v. Parkin, 2 Burr. 663), "in ejectment, as in "all other actions, the judgment only concludes the par- "ties to the *subject-matter of it*." And it may be added, as the converse of this proposition, that "as to the subject- "matter of it, it concludes the parties, as in all other ac- "tions." Thus it is conclusive evidence of the legal right of the plaintiff to the possession of the land recovered, at the commencement of the action and at the time of the verdict, and of his legal right to the rents and profits from the date of the demise to the verdict (3 Blackst. Comm. 206; Benson v. Matsdorf, 2 Johns. Rep. 369), although the action for mesne profits be brought, as indeed it should be, in the name of the lessor of the plaintiff. (Selwyn's Nisi Prius, 4th Am., from 7th Eng. ed., p. 624.) The case in 2 Johnson is of the highest significance. A had judgment in ejectment against B, who immediately brought a new ejectment against A, while A instituted an action for mesne profits against B, according to the result of the former ejectment. The second ejectment, in which B was plaintiff, was tried before the action for mesne profits. B had judgment in this second ejectment, and on the trial of the action for the mesne profits, the counsel for B offered the record of this second ejectment in bar of the action for mesne profits. The court (it was composed of Kent, Ch. J., and Judges Smith, Thompson, Ambrose, Spencer and William W. VanNess, certainly *clara et vener-*

abilia nomina) stopped A's counsel, saying: "It is well settled that the right to mesne profits is a necessary consequence of a recovery in ejectment, and that the defendant cannot set up a title in bar, even if he clearly had the better title. *It cannot be said that the second trial ascertained which had the better right.*"

But the reason why it did not so ascertain, is manifest; because only the *legal right of possession at the time of suit brought was put in issue, or was capable of being put in issue, in this action.*

Thus, then, is the reason of the apparent anomaly. Rightly apprehended, the anomaly disappears entirely, as does a ghost in the sunlight. It is no anomaly, but a logical consequence of the nature of the action; to quarrel with which is to take arms against the action. In Missouri the form and scope of the action are fixed by positive statute, and illustrated by repeated decisions of our courts; of which more presently.

The same learned judge, whose opinion in 2 Burr. 663, has just been quoted, had occasion in an earlier case, to expound in luminous language the nature and effect of judgment in ejectment. "In truth and substance," he said, "a "judgment in ejectment is a recovery of the *possession* "(not of the *seisin* or *freehold*) without prejudice to the "*right*, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance, can "only be possessed according to right, *prout lex postulat* "(as the law requireth)."

"If he has a freehold he is in as a freeholder. If he has a "chattel interest, he is *in* as a termor; and in respect of "the freehold his possession enures *according to right*. If "he has no title he is *in* as a trespasser, and without any "re-entry by the true owner, is liable to account for the "profits." (*Per* Mansfield, Ch. J., in Taylor *ex dimissione*, Atkyns v. Horde, vol. 1. Burr. 114.)

This opinion was pronounced as long ago as Hilary Term,

1757, of the Court of Kings Bench. Every lawyer knows that it is only more precious for this venerable antiquity; and this for the reason that it has ever since been recognized as clear law by every common law court in this country and England.

In 1808, by the unanimous opinion of the Supreme Court of judicature of New York (Jackson, *ex dim.* Wright *et al.* v. Diefendorf *et al.*, 3 Johns. 269), it was declared to be the unchallenged law of that day. The great men who then adorned that high court have already been named. The same ruling was repeated in Jackson *ex. dim.* Beekman v. Haviland, 13 Johns. 229-234.

In 1 Serg. & Rawle 515, White *et al.* v. Kyler, it was held that two verdicts and judgments in ejectment, and acquiescence for 17 years, were not a bar to a new ejectment by the defeated party. This was decided in 1815 by Ch. J. Tilghman. "They are not a bar; certainly they are not," said he (p. 521).

A judgment in ejectment is not conclusive as to any point, even between the same parties, except in the action for mesne profits. (6 Munf. Rep. 433, Pollard v. Baylor, Hopkins v. McLaren, 4 Con. 667).

The whole effect of a judgment in ejectment for plaintiff is to put him in possession of the land, and the only matter decided is that at a particular point of time he had a better legal title to the possession than the defendant (4 Munf. 382, Chapman v. Armistead; 13 Verm't, 183, Parks v. Moore; 3 Harrington 489, Hawkins v. Hayes).

But it is doubly useless to extend this citation of authorities because, even if it were otherwise elsewhere, the rule in Missouri is emphatic, and rests, not only on repeated adjudications, but, singularly enough, on positive statute.

For nearly 80 years (antedating, indeed, its existence as a state, and going back to its territorial law) the essential fact, defined by statute, as giving the foundation of an action of ejectment, has been that the plaintiff is "*legally entitled to the possession of the premises.*" (Territorial laws,

1, Sept. 1807, Guyer's Digest (1818) p. 176; Rev. Stat. of Missouri (1825) p. 343, § 1 of Title Ejectment; Rev. Stat. of 1835, p. 234; Rev. Stat. of 1845, 441; Rev. Stat. of 1855, p. 689; General Statutes of 1865 p. 607; § 2240 Rev. Stat. of 1879.) Thus, ejectment is, and always has been, in Missouri, a possessory action, and all the incidents of that description of action have attached to it. The decisions of its courts will be searched for years in vain for a declaration of what no one was hardy enough to dispute. The first formal adjudication of it appears in Mellon v. Biddle (13 Mo., p. 335 decided in 1850). Biddle had sued Mellon in ejectment and obtained judgment by default. After an unsuccessful motion to set the default aside a writ of possession was executed, and Mellon being put out of possession, immediately brought a new ejectment against Biddle. Biddle had the documentary title; he had recovered the possession in ejectment; but for more than 20 years before the commencement of the ejectment, Mellon had held the land adversely—20 years was then the period of limitation. Upon these facts the Circuit Court gave judgment for Mellon, and the Supreme Court (Judges Napton, Ryland and Birch) affirmed it.

No significance is due to the fact that Biddle's judgment against ~~Miller~~ Mellon was by *default*. It has been repeatedly ruled that a judgment *by confession* in an ejectment is no more a bar than a judgment on a verdict, and that a judgment by default is *qua* judgment, as conclusive as any other (Betts v. Shields, 3 Litt., 36; Mercer v. Watson, 1 Watts, 330).

In 1849, what was called the "Code Practice" was adopted in Missouri. As that "code," among other things, declared that "the distinction between the different actions "at law, and between actions at law and suits in equity, "and the forms of all such actions and suits heretofore ex- "isting are abolished" (§ 1 of Art. I of the Code of Practice, p. 73 of Session Acts, 1849), some gentlemen imagined that not only the ancient forms, but the substance as well,

of actions had been swept away. The first* revising session thereafter was in 1855. Then some members who had never been partial to the science of pleading as expounded by Saunders, Stephen and Chitty, and who entertained a strong aversion to the "old forms" determined to make root-and-branch work of some of them. When the subject of ejectment was reached, though the name and all the essential features of the action were retained, a new section (§ 33 of ch. 58, p. 695, of the Rev. Co. of 1855,) was added, declaring that "A judgment, except of non-suit, in an action authorized by this act, shall be a bar to any other action between the same parties, or those claiming by or under them, as to the same subject-matter." This act appears to have been approved November 23, 1855. By § 18 of ch. 96 of the same revision, p. 1026, it was provided that these general statutes took effect on May 1, 1856."† *On the 21st of November, 1857* (p. 24 of Session Acts of 1857), *this section was peremptorily repealed.*

This legislation is of the highest significance. In 1855 the General Assembly made a solemn declaration that whereas the old law in Missouri was that a judgment in ejectment did not conclude either party, the rule in future should be different. It will be observed, indeed, that the Legislature on that occasion made proclamation of something additional and, perhaps, not intended, that is to say: *its own failure* to comprehend the true nature and office of an action of ejectment. If that deliberative body wished that parties, instead of trying the legal right to the possession, should try the title to the land itself, it should have abolished the action of ejectment altogether and substituted a real action for it. Moreover, forasmuch as the "subject matter" of an ejectment had always been, and must, under the first

*NOTE—By the Constitution of Missouri (Sec. 35, Art. III, of the Con. of 1820), it was provided that, in 1825, and thereafter, at intervals of ten years, all the General Statutes of Missouri should be revised, digested and promulgated. Hence the Sessions of the General Assembly, held in 1835, 1845, 1855, etc., were called the "Revising Sessions."

†NOTE—It was while this law was in force that Miles vs. Caldwell was decided.

thirty-two sections of Chap. 58, Rev. Code, 1855, continue to be, the "legal title to the possession" at a particular point of time; and forasmuch as the judgment in that action had always been conclusive as to this point (Aslin v. Paikin, 2 Burr., 663) the legislation of 1855, however intended, was hardly operative to give stability to that which in its very nature was fleeting: to make permanent that which was, by its essence and definition, only temporary. But in very little more than eighteen months after this new section became statutory law it was repealed—thus not only removing the bar (if any) created by it, but by irresistible logic enacting that "a judgment in ejectment shall *not* be a bar "to any other action, even between the same parties, *and* "*as to the same subject matter.*" Either that legislation has the extent thus claimed for it, or it is entirely unmeaning: a mere monument of the fitness (or unfitness) of the General Assembly for the work of law-making. But at the very lowest, it was impossible for any one, after November 21, 1857, to doubt that no bar was, in Missouri, operated by a judgment in ejectment. Whatever effect might have been attributed to § 33 of ch. 58 of the Rev. Co. of '55, it had been in operation only about eighteen months when a clamor went up for its repeal; and this clamor could only have come from the bench and the bar of the State. The obnoxious section became a law May 1, 1856. It was repealed on November 21, 1857.

In 1862 there was a complete change of the *personnel* of the bench of the Supreme Court of Missouri; and then an effort was made to induce that body to declare that a judgment in ejectment *did* constitute a bar. But the effort was fruitless (32 Mo., 176, Slevin v. Brown). The same ruling was made in Carter v. Scaggs, 38 Mo., 304; Holmes v. Carondelet, 38 Mo., 552. The last decision was made in 1866. Again, in 1879, the question came before the Supreme Court in Kimmel v. Benna (70 Mo., 52, and following); and the answer then given to it is one of the most valuable contributions made by the late Judge Napton to

the jurisprudence of Missouri. The whole subject is ably, learnedly and exhaustively examined, and (in entire accordance with the views expressed in 1 Burr., 114, Taylor, *ex. dim.* Atkyns v. Horde; 3 Johns, 269, Jackson, etc., v. Dieffendorf, and 3 Litt., 36., Betts v. Shields,) the rule is laid down that "a judgment in ejectment is no bar to a "second action between the same parties for the same prop-"erty, whether the title and defenses in both actions be the "same or not." (70 Mo. Rep., p. 52, Kimmel v. Benna, head note). It has been seen what was the condition of the record in the ejectment between Gibson and Chouteau when it left the Land Court in 1865. It is plain that the judge then presiding in that court had a clear perception that only the *legal title* was presented to his notice; and he industriously limited his decision *to the legal title*. Let it be imagined that this judgment had not only been affirmed, but affirmed for the very reason which dictated the giving of it; that the Supreme Court of Missouri had said, when the case came before it, that Chouteau's equitable title acquired under the deed given in evidence "constituted no "bar to the suit, not having been pleaded, or in any way "set up as an equitable bar to the action" (as was said in a precisely similar case, Le Beau v. Armitage, 47 Mo., 138)—would any one have doubted that Chouteau would have been at liberty, nay, that the suggestion had been pointedly made to him, to go into a court of equity for the enforcement of his equitable title? Yet this is not only what was said in this very case by the Supreme Court of the United States, but it is well to remark that, in the case supposed, the *record* of the case, *the judgment* of both courts, would have been precisely what they now are. The only difference would have been in the *opinion* expressed by the court upon affirming the judgment; and this, as we have seen, is only a *reason* for the judgment, not the judgment itself. When the record of the ejectment suit was before the Supreme Court of the United States (13 Wall., p. 92, and following,) it was *precisely* upon the ground that the equitable title of Chouteau

did *not* appear by the record: was not visible to the eyes of the chancellor: that all consideration of that subject was declined.

The learned justice, who was the mouth-piece of this court on that occasion, first dealt with the statute of limitations, and declared the unanimous opinion of his brethren that possession prior to the issue of the patent was no defence to the ejectment. The three first pages of the opinion—13 Wall., 99 to 102—are taken up with this ruling. Then the court goes on—pp. 102 and 103—with what is either an inconsequent, redundant and *extra-judicial* string of observations, or a plain, exhaustive and suggestive analysis of the reasons why it was prevented from looking at the equities invoked in argument by Chouteau's heirs, but which they had omitted to bring in orderly fashion before the court; with an intimation that to obtain the benefit of these equities they must carefully reform their pleadings. That the last of these hypotheses is the true one, is clear. For the shape in which the record stood, in the Supreme Court of Missouri, Messrs. Glover and Shepley were not responsible. *They* had no connection with the case until it had been once argued in the Supreme Court of Missouri. They were *then* employed and they made a motion for a rehearing. They were powerless at that stage, and in that court, to reform the pleadings. When the case reached the Supreme Court of the United States, they earnestly endeavored to induce that tribunal to notice the original and fundamental error contained in the *opinion* of the Supreme Court of Missouri. The Supreme Court of the United States having disposed of the legal defence to the ejectment (the question of limitations), proceeded thus (p. 102): "*For the enforcement of equitable rights, however clear, distinct, equitable proceedings must be instituted.* The "patent "is the instrument which, under the laws of Congress, "passes the title of the United States. It is the Govern-"ment conveyance. *If other parties possess equities supe-"rior to those of the patentee upon which the patent is issued,*

"*a court of equity will, upon proper proceedings, enforce* "*such equities by compelling a transfer of the legal title, or* "*enjoining its enforcement, or cancelling the patent.* But "in the action of ejectment in the Federal Courts the legal "title must prevail, and the patent, when regular on its face, "is conclusive evidence of that title.

"So, also, in the action of ejectment in the State Courts, "when the question presented is whether the plaintiff or "the defendant has the superior legal title from the United "States, the patent must prevail. For, as said in Bagnell "v. Broderick, Congress has the sole power to declare the "dignity and effect of titles emanating from the United "States. * * * In several of the States, and such is "the case in Missouri, equities of the character mentioned, "instead of being presented in a separate suit, may be set "up as a defense to the action of ejectment. *The answer* "*or plea in such case is in the nature of a bill in equity,* "*and should contain all its essential averments. The de-* "*fendant then becomes, with reference to the matters averred by* "*him, an actor, and seeks, by the equities presented, to estop* "*the plaintiff from prosecuting the action, or to compel a* "*transfer of the title.*" The learned Judge then cites with approval, from the opinion of the Supreme Court of Missouri, in Maguire v. Vice (20 Mo. 431,) where the plaintiff brought ejectment on a legal title, and put in evidence a patent, and the defendant relied on an equitable defence, a passage closing with these words: "When a party by his "pleadings sets forth a merely legal title, he cannot on the "trial be let into the proof of facts which show that having "an equity, he is entitled to a conveyance of the legal title. "If he wants such relief he must prepare his pleadings with "an eye to obtain it, and this must be done whether he is "seeking relief as plaintiff or defendant.

This pointed reference to a settled rule of practice, this most pertinent suggestion, was surely not idly, inconsiderately or irrelevantly made. It was intended as the only answer to the urgent argument of Chouteau's counsel which the

condition of the record enabled this high court to make; and its significance is plain.

It was in direct obedience to this suggestion that plaintiffs in error filed their bill for equitable relief. They did this to obtain something which their ancestor failed to get, because he had not asked for it in a proper manner—because, in truth, he had not asked for it at all. Their equity consists in a title conferred on them by the statutes of the United States, and depends upon the construction to be placed upon those statutes. Of this question the Supreme Court of the United States is the final arbiter; but, on their way to that tribunal, they are met by the objection of the Supreme Court of Missouri that these same equities have been fully and finally tried, determined, and adjudged, already.

That they were neither triable nor determinable was held by the Supreme Court of Missouri, in Cameron v. Johnson, 20 Mo. 108 (per Judge Gamble); in Maguire v Vice, 20 Mo. 431 (per Judge Scott); in LeBeau v. Armitage, 47 Mo. 138, and in LeBeau v. Armitage and Gaven, 56 Mo. 191. In the last case, upon precisely the same *facts*, which, when *not* shown by the pleadings, the court refused to regard at all, full equitable relief was given when the facts were presented according to the rules of equity practice.

That the equities were not tried and determined—were not *adjudged*—is clear from an inspection of the judgment itself, which industriously avoids all allusion to the equitable title. It is a mere judgment in ejectment; and the reasons governing the judge in giving it are shown in the instruction which preceded it. The Supreme Court of the United States, in the most pointed manner, declares its concurrence with the Land Court: refuses, as *it* had done, to consider any equitable question, and assigns as a reason for such refusal, a rule which had been repeatedly declared by the Supreme Court of the State, and had no doubt governed the Land Court—the judge of which was a really able lawyer.

It was this judgment of the Land Court—a judgment in

ejectment only — which was affirmed. If the Land Court had treated the equities as cognizable by it upon the pleadings, and had made a *decree* disallowing them; or had the Supreme Court, setting aside the judgment of the Land Court, proceeded to give a new judgment, *disposing of these equities;* whatever might be thought of the manner in which either court had obtained or assumed jurisdiction of the matter, its judgment would have been undeniable, and the Supreme Court of the United States would not only have had full warrant, but would have been under plain obligation, to examine the matter thus unequivocally presented to it. The judgment of the Land Court was only declaratory of law which few lawyers will be bold enough to dispute. Nothing but the legal title was before that court—and the patent was declared to be the best evidence of that title. This judgment was affirmed by the Supreme Court of the State; that is to say, a *judgment* dealing with the legal title alone was so affirmed—and this is *all* by which the plaintiffs in error, seeking equitable relief, are now encountered. But it is said that defendants *might* have interposed their equitable defense when sued in ejectment; that they failed to do this and must abide the consequences.

Now, what are these consequences? What is the penalty for allowing judgment to go in ejectment, and then resorting to equity for relief from it? If the defendant had a legal defense, which for any reason he failed to make, equity would be very slow in relieving him from the consequences of his *laches*; but surely, where the matter relied on is purely equitable, the defendant may choose his own way of invoking the aid of the chancellor. In ejectment the trustee can turn out of possession his own *cestui que trust*. If he does this, and defendant fails to interpose his equity, is it thereby forfeited? Has it ever been imagined that by so doing the trustee defeats the equitable jurisdiction of the chancellor?

Much was said by the counsel of Gibson in the State courts of the law of February 11, 1839, (p. 40 of the Ses-

sion Acts of 1838–9 of Mo.) It was gravely argued that this act made it incumbent on the party to an ejectment in which a New Madrid certificate was a muniment of title, to interpose in the action at law any equitable defense he might have; and that if he failed to interpose any such equitable defense, he lost the benefit of it forever.

Our reading of that, and similar statutes, is entirely different. They confer a privilege, but do not compel the party to avail himself of it. They resemble the statutes of set-off, by virtue of which a defendant, sued by a person to whom, upon a settlement of all matters of account, he was either not indebted at all or indebted in a much smaller sum than was claimed in the particular action, may set upon his counter-claim by way of defense. In many States, and particularly in Missouri, the defendant may even have, in this manner, judgment against the plaintiff for an excess of the counter-claim over the demand asserted in the action. But defendant was never compellable to do this. He might allow the judgment to go against him, and proceed in a separate and independent suit, in which he would be *dominus litis*, to assert his counter-claim; and a party sued at law, and having no defense at law, was always at liberty, and, indeed, until very recently, was compellable, to allow judgment to go against him at law before resorting to equity to enjoin the enforcement of it.

But a most unwarranted operation was claimed by Gibson for this act, in the argument before the State Courts, and it will not be amiss to call the attention of this tribunal to its provisions. The first section of the act—which is declared to be an amendment of the act regulating the action of ejectment—provides that two or more tenants in common may join in an action of ejectment, thus changing the rule of the common law as laid down in 1 Mo. App., 746, Wathen v. English, and Chitty on Pleading, p. 71, (7th Am. from 6th English edition). The second section provides that "when, in any action of ejectment, any lands shall be claimed by virtue of a location in lieu of other land, injured by earth-

quakes, the certificate of new location granted by the recorder of land titles and the patent issued in consequence shall be only *prima facie* evidence of title in the grantee therein named, subject to be rebutted as hereinafter prescribed;" and § 3 proceeds to say, "It shall be lawful for the adverse party to rebut such evidence by proof that the grantee in such certificate or patent named was not, at the time the same or either of them issued, the owner of the injured lands in lieu of which the said certificate or patent issued; and the title to the land located by virtue of such certificate or patent shall be determined according to the equitable rights of the parties to the land as located by virtue thereof." These two sections are all which can possibly be claimed as introducing any novelty in respect of lands located by New Madrid certificates; and the court can see at a glance that the whole scope of them is directed to *permitting* the defendants to show, when such showing would be relevant, that the person to whom the New Madrid certificate issued was not the owner of the land injured by earthquakes. In the present case, it would (waiving, for the present, all question of the power of the Legislature of Missouri to pass such an act) simply enable the defendant to show that the legal representatives of James Y. O'Carroll, to whom the New Madrid certificate No. 150 issued, were not, in 1811, the owners of the land so injured. But in the actual case it is incontestable that they were such owners; and so far from Chouteau having any interest in denying it, it is part of his case that they were such. It is plain, then, that this act imposed no duty on Chouteau which he either neglected, or had an interest in performing; and that to refer to it as having any such effect is an impudent attempt to impose upon this court; to speculate upon its possible unfamiliarity with a local statute.

It may be said, however, that the state court of last resort has denied equitable relief in this case, because it says the equities of the plaintiffs in error have already been judicially determined adversely to them; that this is a matter of local law, and not reviewable by the Federal Court.

If this pretension means anything, it is that the state court may mistakenly or perversely declare that something is to be found in the record which is the basis of its judgment, and that this something is a matter of local law. The record may be scrutinized in vain to discover a trace of this *something*—nay, that which is singled out and designated by the state court as the thing which is the foundation of its judgment may be demonstrated to be glaringly misdescribed or misunderstood before it can lend the least aid to the purpose for which it is quoted; it may be a misdescription or misunderstanding in flagrant contradiction to all legal nomenclature, and an ascription to the thing misapprehended and miscalled, of qualities belonging to something wholly different from it; it may appear that when the same record was before the Supreme Court of the United States, the particular matter now supposed, in the State Court, to be conclusively adjudged, was declared to be *not presented* to judicial cognizance in any degree, or for any purpose; but, notwithstanding, if the State Court, in language sufficiently plain, contradicts the record, disregards the authority of the Federal Court and declares its refusal of all relief to the plaintiffs in error to be a matter of local law, the Supreme Court of the United States must shut its eyes and close its ears to everything but this declaration of the State Court.

It is obvious that the first consequence of the allowance of such a contention will be the extinction of the power of this court to review any judgment pronounced by a State Court, whenever the latter choses to attempt to withdraw that judgment upon any pretence, from the jurisdiction of the Supreme Court of the United States.

The State Courts of last resort would be possessed of more candor than we have any right to expect, if they were fond of having their errors detected and corrected by an appellate tribunal. That they have the disposition to make their judgment unimpeachable in all cases need hardly be said. To tell them that by the flimsiest of pretexts they can defeat the appellate jurisdiction of this court, will present to them

at times an irresistible temptation. The duty seems to be laid on this high court, when its interposition is invoked, to examine whether a case is, under the law, made for its intervention. It can no more decline cognizance of a case where either party has, under the Act of Congress passed pursuant to the authority of the constitution, a right to its arbitrament, than it can usurp jurisdiction of a matter not committed to it by that constitution and those statutes: and it will be as far from committing the one as the other of these improprieties.

It is not in the power of the State Court, by giving to a legal document a name which does not belong to it, to change its nature, and to confer upon it the qualities of something very different. If, in any controversy between A and B respecting the title to a horse (*e. g.*), something should be said by the judge delivering the opinion of the court, which, if it were law, would be decisive of the respective claims of A and B to a tract of land, this *dictum*, though *obiter*, might be a formidable indication of the opinion of that judge, or perhaps of the whole court, as to the respective claims of A and B to the tract of land. No one having the least acquaintance with legal terms or legal reasoning could imagine it to be *res judicata*. It might very well be—in all probability it would necessarily be—so unconnected with all the merits of the litigation respecting the horse, that neither party could be heard to challenge it. The controversy concerning the horse might have been determined on correct principles. The judgment rendered in the cause might be wholly unimpeachable. If a writ of error lay to revise that judgment—to submit it to the criticism of a higher court—and it was notorious that in precisely similar cases the higher court had declared that the erroneous, or even preposterous, reasons given for a right judgment, did not justify it in setting that right judgment aside, what party in his senses would think of prosecuting a writ of error? To what purpose could such a writ be sued out?

When the ejectment case of Gibson v. Chouteau was be-

fore the Supreme Court of the United States, Chouteau's counsel earnestly sought to induce the court to treat him as being clothed with the equitable title, so as to put in operation the doctrine of relation. But the court said, unequivocally and pointedly, that there was no pleading of that equitable title, and that unless it were pleaded according to chancery forms, a court of equity—that is to say, this high court, sitting as a court of equity—could not see or consider the equitable title at all, or for any purpose. If this rule were one which prevailed in the courts of other States, but did not, by the local law of Missouri, have any place in her system, there would be some plausibility for contending that this was a rule of practice to be governed by the usages of the courts of Missouri and to be not reviewable here. But if the rule in question were one especially and uniformly recognized and enforced by the Supreme Court of Missouri, not only before 1866, but afterwards; and if the Supreme Court of the United States, in laying down and enforcing the rule, was but applying the law of Missouri as expounded by its own courts,—it is somewhat startling to be told that the Supreme Court of the United States, in regulating itself by the decisions of the Supreme Court of Missouri, was assuming the stability of a weather-cock, or the fixedness of a will-of-the-wisp, and that it is perfectly competent for the State Court, at any moment, to turn aside from the line which itself had traced, and which, according to all judicial consistency, all regard for justice, should remain fixed and unchanged.

It is conceived that nothing has been neglected by the plaintiffs in error, which it was incumbent on them to do, in order to obtain that to which, by the supreme law of the land, they are entitled, viz: an interpretation by the Supreme Court of the United States of the equitable title they claim under the statutes of the United States. The counsel of their ancestor *intended* to interpose this equitable title as a defense in the ejectment suit, but he committed the mistake of supposing that he could do this without

pleading it according to chancery forms: that it was sufficient to lay before a court of law, the *evidence* of his equity, and that it would thereupon be recognized and allowed. But this was precisely what the Supreme Court of Missouri had uniformly refused to permit, ever since the passage of the law allowing an equitable defense to be interposed against a legal cause of action. What is called the "Code Practice" was established in Missouri in 1849. In Carman v. Johnson, 20 Mo., 108, decided by Judge Gamble in 1854, and in Vice v. Maguire, 20 Johnson, 429, decided by Judge Scott in 1855, it was distinctly laid down that "a party "who, under the present practice, seeks equitable relief "against a legal title, must set forth such a state of facts "as would have entitled him to relief under the old prac- "tice" (head note of the case). Judge Scott declared, as the opinion of the court, that "when a party by his plead- "ings sets forth a merely legal title, he cannot, on the trial, "be let into the proof of facts which show that, having an "equity, he is entitled to a conveyance of the legal title" (p. 431).

Had this rule been abandoned in 1865 or 1866? Not at all. It was enforced in 1870 by the unanimous opinion of the Supreme Court (47 Mo., 138, LeBeau v. Armitage). There, the defendant had, in the trial court, been allowed to give evidence of his equitable title, under a plea setting up only a legal defense, and he had judgment in that court. This was reversed by the Supreme Court, for the reasons given in the cases quoted from 20 Mo.; the cause was remanded, and defendant, having pleaded his equitable title in due form, was (56 Mo., p. 191, decided in 1874 by Judge Napton,) declared to be entitled to full equitable relief upon the *same evidence, which, when the trial court had listened to without the equity being pleaded, the Supreme Court had declared to be wholly irrelevant.*

Such being the rule of practice declared by the Supreme Court of Missouri, the Supreme Court of the United States, when the record of the ejectment suit was before it (13

Wallace, 99,) was of opinion that it could not, without doing violence to the rule of local law as declared by the Supreme Court of Missouri from 1854 to 1870, listen to evidence of an equity not pleaded; and in the most pointed manner it refused to do so, justifying its refusal by reference to the land-marks erected by Judges Gamble and Scott (and their associates), who adorned the bench of the Supreme Court of Missouri in 1854 and 1855.

Obviously, there were no means by which plaintiffs in error could obtain a decision of the Supreme Court of the United States upon their equitable title, by bringing before that tribunal, in any shape, or by any process, a record which that high court had solemnly declared not to prevent that equitable title to judicial cognizance. It was the opinion of the Supreme Court of the United States on that occasion (as it was the opinion of the Supreme Court of Missouri in 1854, 1855 and 1870,) that there was as little resemblance, or, rather, as little identity, between the legal and the equitable title to a tract of land as there was between either, and the title to a chattel. Nothing remained for plaintiffs in error but to shape their prayer for equitable relief in the manner directed by both the Supreme Court of Missouri and the Supreme Court of the United States. They did this, and now they are told by the State Court that the matters which the Supreme Court of the United States, in 1872, declared not to have been even presented to judicial cognizance by the proceedings in the ejectment suit, were not only presented, but conclusively adjudicated, on that occasion. They thereupon scrutinize the record of that case; find it to present nothing but a legal title, so declared by the court of first instance, and expressly determined on that hypothesis; that the judgment given in the trial court is one which peculiarly belongs to the action of ejectment and makes no allusion whatever to equity; that it was this judgment, and no other, which was affirmed; that the judgment of the Supreme Court of Missouri was one of simple affirmance, saying nothing whatever of the equities of Chouteau—

neither allowing or disallowing them — and that all which is adduced as a justification for the extraordinary decision of the Supreme Court of Missouri in this equity suit consists of the *opinion* given by that tribunal for affirming this judgment. If the jurisdiction of this court can be thus defeated, it will be true that not only was the Supreme Court of the United States wholly wrong, in 1872, in refusing to look at the equities of the plaintiffs in error, but that by supposing this court to be the authoritative arbiter of its own jurisdiction, the only entity capable of declaring when a case for its exercise arises, plaintiffs in error have lost their land, though clothed with a perfect equitable title thereto, derived from the statutes of the United States, all benefit of which the State Court has not only refused, but has defeated, by a juggle, all appeal from this injurious action. No one can deny that this is a faithful presentation of the attitude of the defendant in error; but its scandalous indecency surely renders all argument superfluous; and the undersigned cannot believe it to be needful or becoming that he should proceed to make quotations from the language employed by this court in asserting its jurisdiction when thus sought to be ousted. The attempt thus to oust it was made in 1851, and was rebuked in the luminous opinion given by the late Mr. Justice Curtis (Neilson v. Lagow, 12 How., 109). It was repeated in 1870, and still more pointedly rebuked (8 Wallace, 653, Maguire v. Taylor, per Mr. Justice Clifford, whose views were re-affirmed in the same case, 17 Wall., 253). But perhaps the most instructive of the cases on this subject is that of Murdock v. Memphis, 20 Wallace, 590–633. In this last case it is remarkable that, though dissenting opinions were delivered by three eminent judges, their dissent was only to the effect that the views of the majority did not sufficiently enlarge the jurisdiction. But plaintiffs in error have no occasion to invoke any rule more liberal than that defined by the majority.

It is, however, undeniable that, under the act of 1855 (Rev. Stat. of Mo.), any one sued at law and having an equitable,

though not a legal defence, to the action, might, without resorting to a separate suit to enjoin the enforcement of the judgment at law, interpose that equitable defence as a reason why plaintiff should not have his judgment. Still, it was his option to take the one or the other of these courses, and considerations of expediency would no doubt govern his choice of them. But we wish to show the emptiness of the argument made by defendant in error, and we can afford to make the immense concession that plaintiffs in error, or their ancestor, being sued in ejectment, and having failed to make a defence which they had the means of making, must endure all the consequences of the judgment, which, by the hypothesis, they might have prevented, but failed to prevent—what follows? At the very utmost, *that the judgment must stand for what it is worth; that*, but not a jot more, will be the consequence—and now what is that judgment? No one feels more painfully than myself the insufferable tediousness of going over the same ground so often; but, in the light of the history of this case, I hope to be pardoned for the repetitions which are forced upon me. The effect of that judgment, then, is: *first*, that Gibson had, in 1862 and 1865, the legal right to the possession of the land; *second*, that he was entitled to $600 as damages for the detention of it, and to an additional $50 for each month during which the heirs of Chouteau should withhold that possession. So much, we may safely concede, conclusively results from that judgment in ejectment: but we confidently say that this is its utmost limit: that nothing more does or can result from it.

If it be claimed that Gibson, having obtained judgment in ejectment, is entitled to the fullest fruition of that judgment, the answer is, "Has he not, to the utmost, *had* such fruition?" It is no part of his judgment that he becomes entitled to the land in fee: or, indeed, entitled to it at all. He has recovered possession of the land, but it is no part of the judgment that he is to remain *forever* in possession of it. He will, indeed, hold possession until cause to the con-

trary be shown; but nothing in the judgment, or in the nature of this action of ejectment, prevents the defendant himself from showing this the very next hour. *The evicted defendant is at perfect liberty to show—that is, there is no legal bar to his showing—that, from the moment plaintiff got possession under the judgment in ejectment, he is responsible to the late defendant for the rents and profits for which that judgment conclusively shows the late defendant to be legally responsible to the late plaintiff up to the date of it.* Illustrations could easily be given, but they are surely not needed. These considerations demonstrate, not only the reasonableness of the rule that one judgment in ejectment is no bar to another action between the same parties, but that, until the nature and scope of the action are radically changed, no other rule is possible.

By reference to the opinion of Judge Napton, in 70 Mo., 52, it has been seen that this ancient rule is emphatically the law in Missouri. The words and the limitations of Lord Mansfield are quoted with approval; and the erroneous idea, that "the reason for the ancient rule" was "the employment of fictitious parties in the proceeding," is (p. 65) effectually disposed of.

In the opinion of the Supreme Court of Missouri, in the case at bar, it was remarked that counsel for Chouteau & Maffitt assumed in argument "that the doctrine of *res judicata* did not apply to courts of last resort." It so happened that the undersigned (Mr. Glover being at that time sick) was the only counsel who argued the case orally in the Supreme Court of Missouri; and he feels impelled to say a few words in connection with this charge.

He protests most solemnly that he did not say or assume anything of the kind. If he had not carefully digested, and caused to be printed, the positions he *did* assume in argument, he would be less confident in thus flatly denying and repudiating what that very respectable court certainly supposes him to have assumed and said. But he is as certain that he did not assume what is imputed to him, as that he did not

assert that the rules of the multiplication table, and of logic, were suspended when an appellate court was reached. Having put in writing, and having caused to be printed, all the positions taken by him in the Supreme Court of the State, he is enabled to reproduce what he did say, which was, that "all the facts of which the judgment [in this ejectment] is evidence, all the 'matter adjudicated,' must "be found in the record as it left the Land Court. All that "follows is mere comment, more or less persuasive or au- "thoritative, but is not within the letter or spirit of *res* "*judicata*." This is a literal quotation, from his printed argument, of the position which the undersigned assumed before the Supreme Court of Missouri; and he considers himself justified in declaring himself amazed at being so misunderstood by that court. In a motion for re-hearing, addressed to that court, he insisted to the verge, and perhaps beyond the verge, of tediousness that he was as far as possible from denying, to the judgment of the highest court, a quality which attached to that of the humblest; and that whenever the court of last resort, instead of simply affirming a judgment, was by the constitution and laws of the State, or the nature of the case itself, at liberty to give a *new* judgment of its own, that judgment is, at *least*, on an equal footing as to conclusiveness with that of any inferior court. Sometimes (as in the case of Hurck v. Erskine, 50 Mo., p. 116) the appellate tribunal, reversing the judgment of the inferior court, gives final judgment. Whenever the appellate court gives a *judgment of its own*, it does what all other courts do—that is, it applies to the *facts*, the grounds of the judgment ascertained either by the pleadings or by aid of a jury, or, in equity cases, by its own examination of the evidence, *the appropriate legal consequence*. "Judg- "ments are the sentence of the law, pronounced by the "court upon the matter contained in the record." (3 Black's Comm. 395.) In all such cases the judgment is that of the appellate court; and if there be a necessity for enforcing it, resort must be had to the process of the appellate court, which pronounced it.

But in a case at law, when there is no special verdict or equivalent ascertainment of the facts, the appellate court must do one of two things: 1. Decide that there is no error in the record and affirm the judgment of the court below; 2. Decide that there is error, reverse or annul the judgment, and remand the case for a new trial, with instructions as to the law. Practically, we are only dealing with the first of the contingencies named. A judgment of affirmance, then, in a case at law, does not, in any particular, change the judgment of the court of first instance.* It does not substitute the judgment of the appellate for that of the lower court. Ordinarily, and, in the case of Missouri, emphatically, the jurisdiction of the appellate court is strictly limited to examination of the very case, in all its features, tried in the court below. In Sec. 3,774 of the Revised Code of 1879, this rule appears for the twentieth time. It had been declared in the old constitution of 1820 that, with the few exceptions enumerated, the Supreme Court should have "*appellate jurisdiction only*" (Sec. 2, Art. V, of constitution of 1820). The same language was used in Sec. 2, Art. VI, of the constitution of 1865, and in Sec. 2, Art. VI, of the constitution of 1875. The statutory provision contained in Sec. 3,774 of the present revision has been regularly handed down from 1825, and words need not be multiplied to show that if appellate courts could indeed look at and determine any matter *not* decided by the trial court, they would be acting as courts of first instance: that is, transcending their sphere, and doing what the organic law forbids.

If a judgment, in reaching which a court of competent jurisdiction has committed error, be not taken to an appellate court in due course of law, it becomes, though full of error, irreversible, unimpeachable and conclusive as to the subject

* It is sometimes very difficult to find an authoritative decision of a matter so plain that it never has been gravely drawn in question, but in a case decided by the United States Supreme Court in 1869 (in the matter of Howard 9 Wallace, 175), it seems to have been suggested by the relators that judgments of an inferior court acquired "some additional efficacy from an affirmance by the court." This misconception, though indulgently treated by the court, was very summarily condemned (p. 183).

matter of it, between the parties and their privies, forever. It is just as effectual and conclusive as if it had been taken to the court of last resort and *affirmed, but not more so.* What is the office of an appeal or writ of error in an action at law? To determine whether the trial court has committed error. If error has been committed and proper exceptions to its commission have been saved, the judgment becomes a nullity, is so declared, and is set aside by the appellate court. It then becomes as if it had never been rendered. But what if the appellate court decides that there is no error? In that case the judgment of the Circuit Court is *affirmed*—a new and different judgment is not given, but the original judgment is declared unimpeachable. No new FACT is judicially ascertained by the appellate court. Not even a new matter of law, unless properly arising out of the record taken from the court of first instance, can be considered by the appellate court (§ 3,774, Rev. Code, '79). If execution of the judgment be necessary, it is issued out of the court of first instance in all cases of mere affirmance. The undersigned submits that his position on this subject is unassailable, but that it was wholly misunderstood by the Supreme Court of Missouri, and, as he ventures to think, without fault of his, is plain.

At one point of its opinion, the Supreme Court of Missouri says: "While the answer of defendants, setting up their "equitable defense, might have been excepted to because "of the generality of its averments, and defendants have "been required to make it more specific, the worst that can "be said of it is that it stated such defense defectively; and "we have repeatedly held that a judgment rendered upon a "petition which states a cause of action defectively, is good "after verdict, and will be upheld," and many authorities are cited.

Such a remark occurring in an opinion, intended to dispose finally of a case which has been before the courts for more than twenty-one years, severely tries the patience of those who suffer by its strange misapprehensions. That a verdict

will cure a title defectively set out, though not a defective title, is familiar law; and in the same manner, if a defense is inartificially stated, but still *stated*, though inartificially, the plaintiff will not, after going to trial on it, be allowed to say that defendant did not speak as plainly as he should have done; nor will the defendant in that case be heard, if *he* claims any advantage from the obscurity of the language he has employed. But the question being whether the equities of Chouteau and Maffitt have been adjudged, it is submitted by them that it has *never been possible to adjudge them*, that they have never been brought to the cognizance of a court, and that the Supreme Court of the United States declared in respect of the record, in which it is alleged by Gibson that they *were* adjudged, that they could not even be considered, because they were not brought by the record before the observation of the court. When to this it is replied that the pleadings *did* actually state the equities of Chouteau, but did this defectively, as matter of pleading, and in a manner on which the court would have animadverted if the objection had been timefully taken, there is only one possible way of dealing with the enormous and mischievous misstatement. That misstatement proceeds upon the most incomprehensible mistake of fact. For the fiftieth time, reference is made by the undersigned to the answer filed in the ejectment suit; and without the least fear of contradiction, it is submitted, that in it, from first to last, there is no trace of a defence founded on the equitable title of Chouteau. That equitable title consists of the equity he acquired by the deeds of 1824 and 1839 and the interposition of this defence against the enforcement of the legal title; and if any reference to this equitable defence can be found in the answer of Chouteau, the undersigned will, from very shame, retire from the case; for it will have been proved, either that he has formed an opinion upon a paper he has not read, or, that having read it, he is unable to understand what very plain English means.

The sixth formal assignment of errors suggests that the

Supreme Court of Missouri erred in confounding an *opinion* respecting the proper interpretation of a statute of the United States, and the title to land derived thereunder, with the conclusive adjudication of *a matter of fact*, properly in issue between litigant parties; and the seventh formal assignment repeats the same idea in different words.

It cannot be necessary to demonstrate, that if the Supreme Court of Missouri has really done this, it has erred, and all that is needed is to show that it *has* done what is suggested. Attention has been already directed to this point; but before proceeding to the second principal branch of the argument, the undersigned submits one short, and, as he conceives, altogether conclusive proof, on this head.

In brief, in the ejectment suit, begun in 1862, the final *judgment*, rendered in 1872, was only for so much of the tract of 64 acres as lay *south of the south* line of S. 3309, surveyed for Calve. (See printed record, p. 173.) At the very utmost, then, there was no *judgment*, even in ejectment, for the land lying *north* of that line. But this land, lying north of that land, was part of the tract of 64 acres conveyed to P. Chouteau by MacRee and wife in 1839; and in this case, the prayer of complainants, now plaintiffs in error, is to have a decree to them, against the devisee of MacRee, of the equitable title to the entire tract which they purchased from MacRee, for full value, in 1839. Now, if we should even make the gratuitous and utterly unwarranted concession, that such a thing as *res judicata* existed in respect of the southern part of this tract of 64 acres, it is gross to all sense, that, as to the northern part of it, there has been *no adjudication at all*, even in ejectment. But the opinion given by the Supreme Court of Missouri certainly was intended to apply to the entire tract. If this *opinion* was what the Supreme Court of Missouri, in 1882, had in its mind when it spoke of *res judicata*, its action, however erroneous, is intelligible. But if it did not thus misunderstand and misapply those two Latin words, its action baffles all the tests of analysis. If it did not really

suppose that this *opinion* given in 1866 was identical with the *judgment* of the court, with what it calls *res judicata*, it must have refused the prayer of plaintiffs in error as to the southern part of the tract on the ground of *res judicata*, while granting relief as to the northern part of it, or refusing to grant it for some other and different reason.

It sufficiently appears throughout the opinion of the Supreme Court of Missouri, as well as in the pleadings and arguments for defendant in error, that both the Supreme Court of Missouri and Gibson himself did really thus confound these two very different things. It is submitted, however, that this last illustration renders this sun-clear.

The plaintiffs in error are much mistaken, if they have not proved, with superfluous fulness, "that the equitable rights of Chouteau were not adjudged in the ejectment suit." This was the first of the propositions stated by them.

They proceed to the demonstration "that the opinion in that case is, as an authority, or as evidence of what the law *is*, completely discredited and worthless."

While it may be said that the opinion of any court, in any case, is evidence, more or less strong, of the *law* on any point (see the opinion of Platt, in Yates v. Lansing, 9 Johns, p. 415), it is, like all evidence, more or less persuasive or convincing, according to its own coherence, its own reasonableness, its conformity with the rules of logic, and its agreement with other and independent evidence of the law. It is a declaration asserting authoritatively, or an argument tending to prove logically, the conclusion announced. If this declaration be contradicted by another more recent exposition of the law by the same court, and, still more, if the new exposition be by a court whose authority is paramount and controlling, it loses all value as *authority*. It becomes wholly valueless as evidence of what the law is.

What, then, was the opinion of the Supreme Court of Missouri, apart from the question of limitations, in the case of Gibson v. Chouteau, to be found in 39 Mo. Rep., pp. 536, and following?

It was, that prior to August 10, 1841, no individual whosoever, whether James Y. O'Carroll, Tanner, Wilt, Hertzog, Clay or MacRee, had any title, right or interest, whether inchoate or complete, legal or equitable, of which the law could take any cognizance, or which could be the subject of a present sale, grant, conveyance or assignment; that the relations of Hertzog in 1824, and of MacRee in 1839, to the land within survey 2,498 were so shadowy, intangible and unreal as to be incapable of being affected by the most unequivocal assignment and transfer capable of operating on *an existing interest;* and that the ultimate confirmation of the claim did *not* validate a conveyance of the land made at a time when the title was incomplete and the claim unconfirmed. Such was, plainly, the opinion of the Supreme Court of Missouri in 1866–7.

If this really be the law, the plaintiffs in error have no case. From the beginning, they have conceded this. It is because it is *not* the law, because it stands in irreconcilable opposition to the law as declared by the Supreme Court of Missouri, both before and since 1867, and because it is contradicted by an unbroken series of decisions by the Supreme Court of the United States, that the plaintiffs in error believe that thi opinion furnishes no reason for denying their prayer for equitable relief. That this prayer has, up to this time, been denied *because of this opinion alone*, is sun-clear. The St. Louis Court of Appeals treated it as controlling *authority*. The Supreme Court of Missouri supposed it to be *res judicata*. It has been shown that it was not the last; and much less time need be spent in demonstating that it is not the first.

Decisions opposed to it can be found in nearly all of the Western States, and in some of those of the original thirteen; but it is considered best to look at the action of the courts of Missouri and of the United States, and no others. Here, too, no notice will be taken of decisions having merely a strong analogy to the present case. The undersigned will cite none, the law of which is not in plain and flat contra-

diction to the opinion declared in Gibson v. Chouteau in 1866–7.

In the Supreme Court of the United States these cases are —

Landes v. Brant, 10 How., 348; decided in 1850.
Van Renssalaer v. Kearney, 11 How., 322; decided in 1851.
Lesieur v. Price, 12 How., 59; decided in 1852.
French v. Spencer, 21 How., 228; decided in 1859.
Tucker v. Furguson, 22 Wall., 527; decided in 1875.
Hot Springs Cases, 92 U. S. S. C. Rep., 698; decided in 1876.

In the Supreme Court of Missouri the cases are:

Montgomery v. Landusky, 9 Mo., 714, decided in 1846.
Byron v. Sarpy, 18 Mo., 455, decided in 1853.
Papin v. Massey, 27 Mo., 445, decided in 1858.
Harvey *et al.* v. Rusch *et al.*, 67 Mo., 551, decided in 1878.

These decisions cover a period of more than thirty years. An examination of them will show what was laid down on pages 566, 567, 568 and 569 of 39 Mo. is *not* law.

When contradictory decisions are found on any point (the contradictions being irreconcilable) there is no difficulty in dealing with them. *Both* can not be correct. One or the other is bad law, or, to speak more accurately, one *is* law, and the other is *not*.

In Harvey *et al.* v. Rusch *et al.*, 67 Mo., 551, it appeared that in 1802 the Spanish governor at New Orleans, reciting a previous concession and survey by the lieutenant-governor at St. Louis, made to Camp and Reilhe a grant, complete in form, for a tract of land in St. Louis County. The claim founded on this grant was brought before the old Board of Commissioners and rejected, because the grant had been made after the Territory of Louisiana had been, by the treaty of San Ildefonso, ceded by Spain to France. No act of Congress, nor

of any Board of Commissioners, had worked a confirmation of this claim until 1868, when, by a special act, the land covered by it was released to the legal representatives of Camp and Reilhe. Early in the century the tract, by conveyances without warranty or covenants for title, had come to the possession of those under whom defendants claimed. After the special act of 1868 the heirs of Camp and Reible claimed that they, and not the vendees of their ancestors, were the legal representatives intended by the act. They alleged that nothing had passed by those early conveyances, because at their date Camp and Reilhe had nothing to convey. It was obvious that, if the opinion in Gibson v. Chouteau, 39 Mo., were law, the heirs of Camp and Reilhe must prevail. The Circuit Court, the St. Louis Court of Appeals and the Supreme Court of Missouri decided, without a dissenting voice, that the act of 1868 enured to the benefit of those who, in 1806, had taken a conveyance from Camp and Reilhe for this land; that they, and not the heirs of Camp and Reilhe, were the legal representatives intended by Congress. The Supreme Court declared that, until the confirmatory act, the United States was at full liberty to dispose of the land to whomsoever; that any such disposition would have defeated the rights of all claiming under the grant of 1802, but that when the confirmation was made, the title of those who had bought from Camp and Rielhe was made good. This was a direct re-affirmance of the principle laid down, and almost a repetition of the language employed, in Landes v. Brant, 10 How., 348, and Montgomery v. Landusky, 9 Mo., 714.

In Landes v. Brant there had been a concession to Dodier of a lot on the common fields of St. Louis, and Dodier had sold this concession to Clamorgan. Clamorgan had filed his claim before the Board of Commissioners, which on November 11, 1811, had confirmed it to him, directly, without mentioning his heirs, assigns, or legal representatives, and on June 18, 1845, a patent was issued on this confirmation to him, the granting words of which were, "there is therefore

granted by the United States, unto the said Jacques Clamorgan (under Gabriel Dodier), and to his heirs, the tract of land above described." On the 8th of July, 1808, all the right and interest of Clamorgan in this lot was sold by the sheriff under a judgment and execution, and McNair became the purchaser. Brant claimed under McNair. The plaintiffs, claiming under the heirs of Clamorgan, sued Brant in ejectment in the United States Circuit Court, which held that the title under the sheriff's deed was a valid legal title. The plaintiffs sued out a writ of error—the case come before the Supreme Court; it was the subject of a masterly analysis, and the result was summed up (p. 373, of 10 How.) as follows: "Applying the doctrine of relation, and taking all "the several parts and ceremonies necessary to complete "the title together as one act, then the confirmation of "1811, and the patent of 1845, must be taken to relate to "the first act, that of filing the claim in 1805. On this "assumption, intermediate conveyances made by the con-"firmee or by the sheriff in his behalf, of a date after the "first substantial act, are covered by the legal title and "pass that title to the alienee."

At a subsequent part of this opinion (p. 374) the court remarks: "In every case where this court has been called "on to investigate titles, where conveyances of land have "been made during the time that a claim was pending before "a Board of Commissioners, *and where the claim was ulti-"mately confirmed*" [the italics are mine] "in the name "of the original claimant, the intermediate assignments "have been upheld against the confirmee and his heirs or "devisees, in the same manner as if he had been invested "with the legal title at the date of the conveyance."

The last case quoted from the Supreme Court of Missouri, decided in 1878, and the first quoted from the Sup. Court United States, decided in 1850, have been examined. The case of Montgomery v. Landusky, 9 Mo. 714, decided in 1846, is, if possible, stronger still in its assertion of the rule for which plaintiffs in error contend; but I hasten to the

most recent decisions of this high court.

In the case of Tucker v. Ferguson, 22 Wall. 527, the facts were that Congress had made a provisional grant of land in 1856, to the state of Michigan, in aid of certain railroads. The title of the United States was, by the terms of the act, to pass only on the performance of certain conditions; and the State of Michigan was deputed to see to the performance of the conditions. The State, in its turn, made a provisional grant of the lands to the Flint & Pere Marquette Company; and this company, before performing the conditions on which the title was to vest, made a mortgage of the lands. *Afterwards* it performed the conditions. Litigation arose, and the case was before the Supreme Court of the United States, which expressed the following views, (p. 572):

"The validity of the mortgages is not drawn in question "and is too clear to be doubted. We need not, therefore, "consider that subject. When the mortgages were executed "the complainants [who were the mortgagees] took the "legal title so far as the company held by that title, and the "equitable or inchoate title of the company to the residue "of the lands. Copies of the mortgages are not attached to "the bill, and we are not advised particularly of their con- "tents. If they contain a covenant of warranty, the legal "title, as fast as it was acquired by the company, enured to "the mortgagees.—If there was was no warranty, and the "*land*, and not the *title of the company*, was conveyed, the "company is barred by estoppel from setting up the after "acquired title, and the estoppel runs with the land. The "result is the same as if there had been a warranty."

Could any intelligent stranger—a traveler from distant lands, exploring our civilization—read this decision, and that reported in 39 Mo., 566-57, without imagining that the courts of the State and those of the United States, instead of recognizing the same *data* of morals and law, were governed by *opposing* principles of ethics and jurisprudence? In the one case he would see encouragement given to the perpetration of a shocking fraud, and the expression of a

belief that the law which the court sat to administer, looked approvingly on the outrage. In the other he would observe that the suggestions of chicane, such as had been treated with almost affectionate indulgence in 1867, by the State Court, were indignantly spurned by the Federal Court in 1875. The robust equity and healthy good sense of the later decision are in such refreshing and absolute contrast with the former, that the new Anarchisis would be apt, if told that both courts recognized the *same* system of morals and jurisprudence, to think that, great as might have been the triumph of the country during the last seven years in its contests with the forces of material nature, its progress in ethics and logic had been greater still.

The undersigned forbears to analyze the other cases cited. He feels that he has already trespassed too much on the patience of the Court.

But so much stress was, by counsel, in the State Courts, laid upon such cases as Bagnell v. Broderick, 13 Pet. 436; Rector v. Ashley, 6 Wall. 142; Lesieur v. Price, 12 How. 60, and Mackay v. Easton, 19 Wall. 633, that it is permissible to say a word in reply.

In all these cases it was held, as it was tersely expressed in the last of them, that until the plat was placed in the public depository in the territory, of evidences of title issuing from the United States, there was no official recognition of the proceedings taken by the claimant, which bound the Government (p. 633).

That is to say, the land designated was considered unappropriated until the return to the recorder of land titles of the survey of the location; and any disposition made thereof by the United States in the interval defeated the title of the New Madrid locator.

So much being settled, the extraordinary argument was urged that, *because* the claim of the New Madrid locator, after the making, but before the return of the survey, *might have been defeated* by the United States, *therefore*, if, instead of being defeated, it were *perfected* by the United States, it

was to be treated as having no validity, no existence, no *inception*, indeed, prior to such completion. A glance at the opinion in 39 Mo. (pp. 566–570) will satisfy any one that this astonishing view found favor with the learned judge who was, on that occasion, the mouth-piece of the court; but surely nothing more than a glance will be necessary to show its untenableness. In the last case cited above (92 U. S. S. C. Rep., Hot Springs Cases,) occurs, at p. 715, an observation which disposes, by one breath, of this fallacy: "It is not shown that any further efforts were made to have "the location perfected, until after the passage of the act "of 1832. If, at any subsequent time, it became the duty "of the Surveyor-General to return the survey to the re-"corder's office, no application for that purpose seems to "have been made. A clear duty on his part could have "been enforced by mandamus, had he refused to perform "it." Every intelligent law-student knows that the right to a *mandamus* postulates the possession of a title which a court of justice will recognize, and *a fortiori* of a right which the party may sell and convey.

In the case of Fenn v. Holme, 21 How., 481, this court had under examination this very New Madrid location. The court said that "the plaintiff in the Circuit Court founded his claim exclusively and solely upon the New Madrid warrant." It adds: "No plat or patent certificate, either for the whole of the warrant or for any residue to be claimed thereupon, was ever returned to the General Land Office, and no patent issued" (p. 488); and, on p. 487, it had declared that these facts showed that the action in that court [the Circuit Court] was instituted upon an equitable and not upon "a legal title." This is all which we need. MacRee, in 1839, had an equitable title, and he conveyed it to Chouteau. After this express adjudication, it is surely needless to go further.

If the *opinion* of the Supreme Court of Missouri, pronounced in 1867, be law, then the plaintiffs in error have no equity, and the judgment of the State Court in this

case must be affirmed. If it be not the law, then, because it decides a federal question, the judgment of the State Court must be reversed; and the decree of the Supreme Court of the United States should, it is submitted, give the plaintiffs in error the benefit of their equitable title, directing the State Court to make a decree enforcing it, by holding Gibson to be their trustee as to the land from the time of the execution of the writ of possession in 1872, and to be accountable to them for the rents and profits from that time.

When framing their bill, the heirs of Chouteau dwelt, and believed, as they believe still, that they had warrant for dwelling, on the strange and startling departure from usage in the issue of a patent in this case. Patent certificate 447, issued in August, 1841, called for a patent conveying to the legal representatives of James Y. O'Carroll the land embraced in U. S. Survey 2,498. Forasmuch as the legal representatives of O'Carroll were undoubtedly the owners of the land when it was injured by earthquakes, there was manifest propriety, according to the long-established practice of the Land Department, in conformity with the opinion of Mr. Wirt, dated May 11, 1820, (p. 233 of Opinion of Attorney General, U. S. Executive Document, No. 55, of 2d Session of 31st Congress,) that the patent should, under the provisions of the Act of February 17, 1815, "issue to the person who was the owner of the injured land at the date of the Act, or, in case of his death, to his heirs or devisees." "The Act," proceeds Mr. Wirt, "attaches no assignable quality to the charity which it bestows; and the Act being the only warrant of authority to the Commissioner to issue a patent at all, he must pursue that authority strictly. The certificate of the clerk of a court, 'that there appears of record in his office a regular chain of title' from A to Z, is an extra-official act, and entirely nugatory. * * * It was not the intention of Congress to make these charities a subject of speculation. * * * It was not their intention to encumber the Commissioner of the General Land Office with the laborious duty of tracing the genuineness of a long

train of assignments, with all the usual concomitants of fraud and oppression, if not of forgery and perjury. The Act looked to the immediate relief of the sufferers, and hence, by the terms of the Act, the relief is strictly confined to them; so that I see nothing, either in the language or the object of the law, to authorize the issuing of a patent to any person other than the owner at the date of the Act, or, if he be dead, to his heirs or devisees."

From 1820 to 1862, and, with this one exception, at all times since, as far as I can learn, the practice of the Land Office had been uniform, and strictly conformed to this opinion of Mr. Wirt. Patents were issued to him who was the owner of the land at the date of its injury by earthquakes, or to his legal representatives. All precedent required that, in this case, the patent should have been issued to "James Y. O'Carroll or his legal representatives." It was to "James Y. O'Carroll, or his legal representatives, that New Madrid certificate No. 150, issued in 1815; it was in the name of "James Y. O'Carroll, or his legal representatives," that Christian Wilt gave notice of the location of this certificate in 1818; in the same name was the patent certificate 447, issued in 1841; and for "James Y. O'Carroll, or his legal representatives, "United States Survey 2498 had been made as early as 1818, though not returned to the Recorder until 1841. Nay, the amended patent certificate issued in March, 1862, was to "James Y. O'Carroll or his legal representatives." But when the patent was issued on June 10, 1862, it is declared, in contempt of the warning given by Mr. Wirt, and by an act as "extra-official and nugatory," when attempted by the Commissioner of the General Land Office, as when performed by the clerk of a court, that "*Whereas, the right of the said James Y. O'Carroll, through sundry intermediate assignments, has been transferred to Mary MacRee, there is, therefore, granted by the United States to the said Mary MacRee,*" etc. We further see that it had been declared on 26th March, 1862, that the patent certificate 447, issued in August, 1841, was errone-

ous and was recalled, and new patent certificate issued, numbered 494. It was also declared that Survey 2498 was "erroneous in omitting to show the interference of other surveys with the same," and "it was set aside, canceled and annulled," and a new survey, called by the same number, and covering precisely the same land which was embraced in the condemned survey, was declared to exist in the place of it; though it is clear from the face of these acts that this *new* survey was then and there devised and concocted in the office of the Commissioner. The gross and audacious irregularity of this proceeding was too much even for the Judge who delivered the opinion of the Supreme Court of Missouri, in 39 Mo. Rep. (see p. 562). Let us look at the several steps taken in the General Land Office, at Washington City, and in the offices of the Recorder of Land Titles, and of the Surveyor General, at St. Louis, in the years 1862–3.

On the 2d of April, 1862, an order was procured from the Surveyor General of Missouri and Illinois, setting aside, cancelling and annulling "the transcript plat of survey No. 2,498, in the name of Jas. Y. O'Carroll, or his legal representatives, under New Madrid Certificate, No 150, etc., etc.," because of its "being erroneous in omitting to show the "interference of other surveys with the same, being in con- "travention of the instructions of the Commissioner of the "General Land Office, having been superseded by the cor- "rect plat of said survey, returned to said recorder by "the undersigned on the 26th of March, 1862, on which *a* "*new patent certificate and a patent to Mary MacRee,* "*assignee of James Y. O'Carroll, has been issued.*" [The italics are mine].

In December, 1862, it was ordered "that patent certifi- "cate 447, issued on the 16th day of August, 1841, in the "name of James Y. O'Carroll, original claimant under "United States survey No. 2,498, under New Madrid certi- "ficate No. 150, for 640 acres, and delivered to General "William Milburn, being in contravention of the directions

"of the Commissioner of the General Land Office, and "having been erroneously issued, is hereby set aside and "annulled, and declared to be void and of no effect."

On the 9th of January, 1863, the Commissioner (Mr. Gibson was at that time an official at Washington—Solicitor of the U. S. for the Court of Claims—a fact of which courts of justice will take judicial notice,) of the General Land Office wrote to the U. S. Recorder at St Louis, informing him that Hon. C. Gibson has filed in General Land Office his order dated December, 1862 (as above), and informing him that another patent certificate, dated March 26, 1862, numbered 494, had been issued in lue (*sic.*) of the above mentioned.

On the 3d of March, 1863, the Secretary of the Interior validated the action of the Commissioner of the General Land Office.

On the 10th of June, 1862, the patent was issued "to "Mary MacRee, as assignee in right of the said James Y. "O'Carroll in deraignment of title, and to her heirs, the "tract of land described in the aforesaid survey, No. "2,498."

What was the motive of these several acts? First, we see that they were all done by Gibson. The entries at St. Louis say nothing of this; but the letters from Washington tell the story. Why did he procure the annuliment of the transcript plat of survey No. 2,498 on April 2, 1862, merely to have a new plat of survey, for the identical land, issued by the Suveyor General on the same, March 26, 1862? How does it come to pass that an order made at St. Louis on the 2d of April, 1862, by the Surveyor General of Missouri and Illinois, should speak of "a patent" already issued "to Mary MacRee, assignee of James Y. O'Carroll," *more than two whole months before the actual issue of that patent?* How did it come to pass that this officer, was able, two months in advance, not only to speak of this patent as existing, but to know that it was the intention of the Land Office in this case to violate and disregard a rule in respect to the patentee

which had been sacredly observed for more than forty years? What was the object of procuring the patent directly to Mary MacRee instead of to the legal representatives of James Y. O'Carroll, the original sufferer?

There is but one answer to all these inquiries. The whole business was managed and controlled by Gibson. That in 1862 or before, a plan was formed to procure the issue of a patent to Mary MacRee, directly, for the whole tract, and for her conveying to Gibson, her zealous co-adjutor in this plan, this tract of 64 acres: that both of these knew that this tract of 64 acres had been twice bought and paid for by Pierre Chouteau, and that he had been in possession of it since 1824; that the first deed to him was made in 1824 by the grantor of Samuel MacRee, and the last by S. MacRee, himself, and Mary MacRee, his wife, in 1839, in confimation of the first conveyance; that the Surveyor General, moved and influenced by Mary MacRee and Gibson, went through the ridiculous farce which even Judge Holmes characterizes as an utterly unauthorized and void proceeding (39 Mo., 562-3); that such was the zeal of Gibson that the Surveyor General became prophetic under his inspiration, and was able, not only to speak of things future as of things past, but even to predict in what respects that which had not yet taken form, would disregard all the rules as to form, which had been sacred for more than 40 years; that the statement was certainly made to the Land Office that Mary MacRee was the sole owner of the location; that this statement could not be true if Chouteau owned any part of it; that both MacRee and Gibson knew that Chouteau had two deeds for this tract of 64 acres from the parties through whom Mary MacRee claimed, and had held possession under them for nearly 40 years—all these things are as manifest as the sun at midday.

It is surely unnecessary to point out the motives which prompted these irregularities; the difficulties they imposed on Chouteau and the advantage they gained for MacRee and Gibson. The case is, however, so strong in its other fea-

tures, that only this very brief reference to these irregularities in procuring the patent in its present form seemed called for; and as the State Court in its action ignored this point altogether, and placed its decision wholly upon the record of the ejectment suit, it would, perhaps, have been more proper for plaintiff in error to say nothing of this particular ground for equitable relief. Nevertheless, it is plainly a matter of grave misconduct on the part of Federal officials promoted by Gibson and tending to the injury of Chouteau; and his heirs only desist from pressing it on the attention of this high court, because they feel that, independently of it, their claim to equitable relief is complete.

There is no possibility of disguising the fact, that they came into the State Court, claiming an equitable title, depending for its validity upon the construction of a statute of the United States, and that the State Courts denied their prayer and refused the relief asked for because of what had been done in and about the ejectment suit of Gibson v. Chouteau; that the courts of first instance, in that ejectment suit, had cognizance only of the legal title of the parties, and confined itself to the consideration of that legal title; that the Supreme Court of the United States, before which came the record of this ejectment suit, declared that only the legal title of the parties was presented for adjudication; that plaintiffs in error are in no default, having promptly obeyed the intimation given in 13 Wall., and having sought in the mode there suggested, the equitable relief which, this high court told them, could only be had in that way; and that the Supreme Court of Missouri, before which this case has necessarily passed on its way to the court of final arbitrament, has only succeeded in obscuring the nature of the questions presented, by the record, to the Supreme Court of the United States, by an extraordinary misapprehension and consequent misdescription of what was done in the ejectment suit. If what was done therein had been described as it really was, viz: the laying down of a rule of law, the expression of a legal opinion respecting the equity of Chouteau, *which was not before the court for*

adjudication, and respecting which no decree was made, no one could have failed to see, at a glance, that if this opinion were erroneous, and not made part of the record by being embodied in the judgment or decree pronounced by the court, it was subject to be corrected by evidence of what the law really is, whenever these equities should come up for adjudication according to the forms of equity proceedings. As the proceedings in the ejectment suit consist of a judgment upon the legal title only, and an *opinion* respecting the equitable title (which the Supreme Court of the United States, in the most emphatic manner, pronounced to be wholly *obiter dictum*; to be given on a point which the record did not present, and which, therefore, could not be with propriety judicially examined by any court of Missouri or the United States), it is obviously true that nothing but the legal title was or could be adjudicated. The *opinion*, or statement of reasons, given by the Supreme Court of Missouri in 1866 for refusing to disturb the judgment on that legal title may, or may not, have weight as authority, as showing what the law is. To tribunals subordinate to that Supreme Court, itis, of course, of controlling authority; and was so treated by the St. Louis Court of Appeals. But when examined in the court of last resort, and shown to be in flat and irreconcilable contradiction with every legal and equitable principle consecrated by *its* decisions, no prolongation of the discussion seems permissible.

The undersigned is quite aware that the basis of the motion made by the defendant in error is the alleged want of jurisdiction of this high court of the writ of error in this cause, and that in this argument he appears not to have confined himself to the question of jurisdiction alone, but has discussed the merits of the controversy. His apology for so doing is two-fold. In the first place, it was unavoidable that he should, in showing that a federal question had been presented by the record to the Supreme Court of the State, and erroneously decided by that court to the prejudice of plaintiffs in error, be led into an examination of the merits.

In the second place, an admonition has been given by this high court that, in considering a motion to dismiss a writ of error for want of jurisdiction, it will sometimes inquire whether the judgment given was right or wrong. The undersigned found it impossible to demonstrate the jurisdiction of this court, which is challenged by this motion, without laying bare the story of the spoliation of which plaintiffs in error have thus far been the victims. He much regrets that this preliminary question was presented to the court in advance of a hearing on the merits. The legal right of this high court to hear and determine this cause is inextricably mingled with its obligation to repair the wrong of which this record is the history; and the consideration of the one, necessarily involved that of the other, proposition.

Respectfully submitted.

THOS. T. GANTT,
Of Counsel for Julia Maffitt.

111-200

OFFICE SUPREME COURT U.S.
FILED
FEB 11 1884
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of United States.

OCTOBER TERM, 1883.

CHARLES P. CHOUTEAU AND JULIA MAFFITT,
Plaintiffs.

vs.

CHARLES GIBSON, ... *Defendant.*

MOTION BY DEFENDANT GIBSON TO DISMISS THE CAUSE FOR WANT OF JURISDICTION.

STATEMENT AND BRIEF FOR CHARLES P. CHOUTEAU, ONE OF THE PLAINTIFFS IN ERROR.

GLOVER & SHEPLEY,
Attorneys for Charles P. Chouteau.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

heir and assigns with general warranty. November 30, 1815, New Madrid certificate No. 150, issued to James Y. O'Carroll, or his legal representatives, on account of injury to said land in pursuance to the provisions of the Act of Congress, for the relief of the inhabitants of the late County of New Madrid, in the Missouri Territory, who suffered by earthquakes. Appd. February 13, 1815 (3 U. S. Stat. at Large, p. 211). March 7, 1816, said Ruddle conveyed 550 arpents of the tract to James Tanner and Andrew P. Gillispie, reciting such injury with general warranty and passing all his rights of relocation. October 17, 1816, said Gillespie conveyed his interest to said Tanner, warranting against himself and assigns. May 16, 1818, Ruddle and wife conveyed 200 arpents, the residue of the 640 acres, to Andrew P. Gillispie. June 1, 1818, James Tanner conveyed to "Christian Wilt" the 640 acres, and all right and privilege of relocation, and covenanted with said "Christian Wilt" to warrant and defend the title generally, and that he would any time after the location and survey of the new land, convey such relocated land to said "Christian Wilt," or his assigns. June 16, 1818, "Christian Wilt," as the legal representative of O'Carroll, gave notice of the location of the 640 acres, part of which is in question. The location was surveyed in April, 1818, and survey returned to the recorder August 10, 1841. That said Wilt was a merchant, and "*Christian Wilt*" was the name of a mercantile firm composed of Christian Wilt and Joseph Hertzog; the latter owning all the capital, assets and effects of the firm. That Christian Wilt purchased the certificate No. 150, and land located by it with the partnership funds.

October 26, 1822, Joseph Hertzog, in consideration of a debt due by him to Louis Devotion, being a judgment for $9,549 recovered against said Hertzog, conveyed said 640 acres of land to Robert Wash, in trust to secure said debt.

November 27, 1822, Wash, as trustee, conveyed to Pierre Chouteau in part satisfaction of said debt, said 64 acres;

afterwards conveyed to him by Samuel McRee, and now in dispute.

That Henry Clay executor of James Morrison, recovered a judgment on a debt due by the firm of "*Christian Wilt*" against Joseph Hertzog, surviving partner of said firm for $2,286 debt, and $147.45 damages in the circuit court of St. Louis County, Mo. That an execution of *fieri facias* issued thereon December 16, 1824, and was levied on said 640 acres, and the same was duly sold and conveyed by the sheriff to Henry Clay, his heirs and assigns, by deed dated May 17, 1825. October 20, 1829, Henry Clay filed his bill in equity in the circuit court in St. Louis County, Mo., against said Wash, the heirs at law of Christian Wilt and Joseph Hertzog; said defendants were duly brought before the court and all their right, title, and interest was by a decree of the court vested in said Clay. October 11, 1839, said Clay in consideration of $500 paid to him by William McRee in his lifetime, conveyed said tract of 640 acres to Ann McRee, James F. McRee, and Samuel McRee, only heirs and legal representatives of said William McRee, with special warranty against himself, his heirs and assigns.

That by deed dated July 4, 1836, acknowledged and delivered July 12, 1836, Ann McRee and James F. McRee, and Mary McRee his wife, conveyed said tract of land to Samuel McRee with special warranty against themselves, their heirs and assigns.

That by deed dated August —, 1838, not acknowledged or delivered till on or after October 31, 1839, Samuel McRee conveyed, bargained, and sold to Pierre Chouteau, the ancestor of plaintiff's, the 640 acres of land now in dispute. This deed recites that the land conveyed by it is "*part of the tract located under a New Madrid certificate issued to James Y. O'Carroll or his legal representatives*," and is the same "*parcel of land conveyed to said Pierre Chouteau by Robert Wash as trustee of Joseph Hertzog by deed recorded in the recorder's office of St. Louis County, Book M, p. 172.*"

March 23, 1844, Samuel McRee, who so sold and conveyed to Pierre Chouteau the 64 acres, filed his bill in equity in the Circut Court of St. Louis county, claiming that at the time he so conveyed to Pierre Chouteau, the ancestor of the plaintiffs, he had unquestionably the equitable title to said 640 acres tract vested in him. In support of this claim said Samuel set forth the following facts viz: That Joseph Hertzog, prior to the year 1818, entered into partnership with Christian Wilt, in the sale of merchandise at St Louis; Hertzog to furnish all the capital, purchase the goods in Philadelphia and elsewhere east and send them to said Christian Wilt, who was to reside in St. Louis and attend to the business there and receive one-half of the profits and suffer one-half of the losses. The name of the firm was "Christian Wilt" and was composed of said Hertzog and Wilt.

That in the fall of 1818, a new firm was established in the name of "C. & A. Wilt & Co.," composed of Andrew Witt, Christian Wilt and Joseph Hertzog, each to own one third of the capital.

In the mean time the debts of the old firm of "*Christian Wilt*" remained unpaid.

That said Hertzog advanced all the capital for Andrew Wilt, in the new firm of C. & A. Wilt & Company.

That both Andrew Wilt and Christian Wilt died in 1818; but after Andrew's death, the name of the firm was re-established as that of "Christian Wilt."

That no profits were made, but losses instead, and it became necessary for said Hertzog, surviving partner of "Christian Wilt," to pay the debts of said firm.

That said Hertzog, as surviving partner, filed a bill in equity in the said Circuit Court in 1821, and procured a decree against the administrator and heir of Christian Wilt, vesting in said Hertzog said 640 acres of land. That said decree was defective because George Wilson Wilt, the heir at law of said Christian, was not made a party thereto. That nevertheless, the said Samuel McRee was the equitable

owner of said land. That Hertzog, as the surviving partner of the firm of Christian Wilt, owed a debt to Henry Clay, executor of James Morrison, and in December, 1824, Clay had judgment for $2,286 debt, and $147.45 damages, and issued an execution under which he sold said land, and received the sheriff's deed dated May 17, 1825. Said Samuel McRee in said bill further stated that said Clay, October 11, 1839, conveyed said 640 acres of land to Ann McRee, James F. McRee, and Samuel McRee, as heirs of William McRee, and that said Ann and James F. McRee, and Mary McRee, his wife, July 4, 1836, conveyed their title to said land to said Samuel. The said bill then proceeded to make Robert Wash and the heirs and legal representatives of George Wilson Wilt, deceased, the only descendant of said Christian Wilt, and all the heirs at law of Joseph Hertzog, defendants, and prayed that they answer said allegations, and state whether each of them is not true, and that defendants be decreed to execute a deed to said Samuel, his heirs and assigns, conveying all the interest of Wilt and Hertzog. That defendants were duly brought before the court, and the title decreed to said complainant.

And in said bill the said Samuel averred that the facts stated by him, all of which occurred prior to his conveyance of the 64 acres to said Pierre Chouteau, gave him, said Samuel, an unquestionable equitable title to said 640 acres of land, all of which these plaintiffs are advised was and is strictly true. That is to say, that said Samuel by virtue of the facts alleged in his bill, was vested under the laws of the United States with the equitable title to said land. That said Pierre Chouteau immediately after his purchase from Wash, on the 27th November, 1824, entered into possession of said 64 acres and held the same without interruption or adverse claim until May 6, 1872, when defendant Gibson claiming title entered on a portion thereof, as will be shown.

The plaintiffs in their petition aver that the said conveyance by Samuel McRee to Pierre Chouteau, of the 64

acres vested an equitable title thereto in said Chouteau. That said conveyance was an equitable assignment of so much of the certificate No 150 as covered said 64 acres; and said Samuel was equitably estopped to deny the certificate was located at that time. That by virtue of the deed of Tanner to Wilt, said Samuel as assignee of Tanner was bound to convey to said Pierre the said land when located. That said Samuel never denied the title of said Pierre Chouteau, and always spoke of the land as Chouteau's. That he instituted said suit in Chancery for himself and assigns. intending to perfect Choteau's title as well as his own, and so stated to Choteau.

October 16, 1845, said Samuel made a deed to Lucas and Hunt referring to said 64 acres as the property of said Chouteau. That said Chouteau paid the taxes on said 64 acres as his own land and neither said Samuel or any one else ever paid taxes on or claimed the same from 1824, till 1872, when Gibson took possession of a part of it. That in 1847, Samuel McRee had a surveyor to survey his land, in survey 2498 and make a plat thereof and put up corners between his own land and Chouteau's 64 acres.

That said Samuel McRee died in 1849, devising his estate to Mary McRee, his widow.

That said Mary McRee and the defendant Gibson, conspired to defraud said Pierre Chouteau and his heirs out of said 64 acres of land. Their plan was to control the officials of the Land Office department so as to have a patent issued directly to Mary McRee and vest a legal title in her to the whole 640 acres notwithstanding the equitable rights of said Pierre Chouteau, which being done, said Gibson was to have for his fees Chouteau's 64 acres. Another part of the plan was to procure some pretended outstanding titles to furnish a color of justice for the proceeding. That said Gibson procured some deeds for the 640 acres, but from persons none of whom had any title. Nevertheless said Gibson affected to own the whole tract, and conveyed all of it to said Mary McRee who released the 64 acres to him. That said

Gibson laid before the commissioner of the General Land Office, said pretended conveyances and by false representations that Mary McRee was the owner of the 640 acres, procured a patent to her direct and caused to be inserted therein a false recital that she was sole assignee of James Y. O'Carroll, and derived title from him to the whole tract.

That said Gibson and Mary McRee assuming erroneously that no title or interest in the land had vested in any one till the return of the survey into the recorder's office with a view to consummate said scheme, caused a new survey to be made, not different in effect from the old one, but subsequent in date to the conveyance by Samuel McRee to Chouteau; also caused a new patent certificate to be issued to show as they supposed that no location had been previously made. That said patent to Mary McRee was procured by fraud, vesting in her *the legal title to the 64 acres*, the same belonging equitably to plaintiffs. That nothing was received by the United States for it, but said certificate No. 150, of which 64 acres belonged to said Chouteau. That no new interest in said certificate or land was ever procured by Gibson of Mary McRee or Samuel McRee after the said deed to Pierre Chouteau.

The record shows that on the hearing of the cause the plaintiffs proved positively every averment of fact in their petition.

The answer of the defendant, Gibson, denied almost every averment of plaintiffs, including those setting forth deeds and records on which the title of Samuel McRee was based.

The defendant's answer disclaimed all connection with any title under Wilt, Hertzog or Samuel McRee; denied that any of them ever had any right, title or interest in the land in controversy; averred that he and Mary McRee independently of any devise from Samuel McRee, held the just and equitable title to the land by virtue of other titles which she bought, as he would particularly show. He denies that he *untruly* represented to the surveyor-general that Mary

McRee was the only rightful owner of the location; denies he *untruly* represented to the commissioner of the general land office or to the president that all the right of O'Carrol was vested in Mary McRee. He says he did claim that Mary McRee owned the whole tract. That he never knew that Pierre Chouteau or Mary McRee held any part of the land in dispute under Samuel McRee; tho' he did know of the deeds to and from Samuel McRee as they appeared of record. And he avers that when said patent issued to Mary McRee she had other and better rights and titles than said Samuel's.

He denies that prior to 1841 (the year in which the survey was returned to the recorder), either Samuel McRee or Christian Wilt had any inchoate right or right in process of maturity, to a perfect right or any contingent right to said land, which could be a proper subject for an equitable agreement to vest the land in an assignee at any time; "or equitably estop any one from asserting the contrary; or defeat the consummation of any perfect right by any preventive act."

The defendant then averred that the certificate No. 150, in virtue of which only he and Mary McRee can derive title, *was illegal and fraudulent.*

The defendant further answered that on 24th September, 1862, he commenced an action of ejectment in the St. Louis Land Court, against Pierre Chouteau and others, to recover possession of the 64 acres, and final judgment was recovered in his favor January 28, 1865, and that Pierre Chouteau and other defendants in that case "*put in issue, set up, and had the benefit of the same claim to the equitable right or title which they set up in this petition. That every document under which they claim in this case, was put in evidence in that case, and every point and argument even, under which plaintiffs claim, in this case was pleaded, and set up and claimed by them, and involved and determined in that case, and the defendant relies on the judgment so ren-*

dered in that case, as a bar to the plaintiffs claim to the equitable right set up in their petition in this case."

The defendant admits he insisted that *the pleadings in said ejectment suit* did not authorize the court to consider or determine the defendant's claim of equitable right. But the defendant therein insisted the pleadings did raise the issue, and that the patent enured to them, and the court "decided the defendants had not a shadow of legal or equitable right."

To maintain that part of his answer which disclaimed all title and right derived from Samuel McRee or Wilt, and affected to rely upon other and better titles not derived from them, Mr. Gibson put in evidence the following conveyances, viz:

(1.) John Ruddle to W. T. Mason, 640 acres survey 2498, dated May 30, 1859.

(2.) Hester Ruddle and others to C. Gibson, all their interest in same tract, dated November 28, 1856.

(3.) John S. Ruddle to Gibson, all his interest in same tract, January 27, 1857.

(4.) Eliza Ruddle and others to Gibson, all their interest in same tract, dated January 22, 1857.

(5.) Alexander Summers and wife to Gibson, all their interest in same tract, dated November 28, 1856.

(6.) Lotty Friant and others to Gibson, all interest in same tract, dated January 22, 1857.

(7.) Hester Ruddle and others to Gibson, all interest in same tract, dated November 28, 1856.

Gibson also put in evidence other deeds, viz:

(8.) George Ruddle to William Rogers, dated February 23, 1811, never recorded in New Madrid Co.; recorded in St. Louis Co., December 19, 1871.

(9.) Wm. Rogers to John Ruddle, dated August 18, 1817, never recorded in New Madrid Co.; recorded in St. Louis Co., 1871.

But there was not a particle of testimony connecting any of these grantors with O'Carrol or George Ruddle, or any owner of the land either by descent or grant. They were intended to enable Mr. Gibson to say he had some other title than that of Samuel McRee. George Ruddle conveyed the whole O'Carrol tract to Tanner and Gillespie prior to 1819.

To maintain that part of his answer called *res judicata*, Mr. Gibson put in evidence the record of the suit in ejectment by Gibson v. Chouteau, commenced in the Land Court of St. Louis County, Mo., September 3, 1862.

The plaintiff's replication denied the affirmative statements in the answer.

ASSIGNMENT OF ERRORS BY CHARLES P. CHOUTEAU, ONE OF PLAINTIFFS.

The plaintiffs in error thereupon assign the following as errors committed in this cause by the Supreme Court of the State of Missouri, that is to say—

First. That the Supreme Court of the State of Missouri erred in deciding that under the Statutes of the United States, no interest whatever, inchoate or complete, legal or equitable, in the land in controversy, rested in the legal representatives of James Y. O'Carroll prior to the return of survey 2498 of the location made under New Madrid Certificate No. 150, to the office of the Recorder of Land Titles.

Second. That the Supreme Court of the State of Missouri erred in deciding that prior to such return, no transfer, sale, assignment or conveyance, by the owner of the certificate of the land embraced within such survey, could, although the location was afterwards perfected, and a patent issued therefor, operate to pass to the transferee, vendee, assignee or grantee of the land, any interest therein.

Third. That the Supreme Court of the State of Missouri erred in deciding that where the initial steps under the laws of the United States to obtain the title to a tract of land, and the person taking such initial steps had, for value, sold, transferred, conveyed, and delivered possession of such land to another, (such sale and transfer not being forbidden by law), and the title was afterwards perfected, the vendee or transferee, who had for the period of more than twenty years next after such sale and transfer, and prior to such perfecting, uninterruptedly possessed, occupied and improved such land, acquired no interest, legal or equitable, therein, but was liable upon the issue of the patent, to be evicted therefrom as a trespasser by the devisee of his vendor.

Fourth. That the Supreme Court of the State of Missouri erred in deciding that there was any evidence whatever in support of the defendant's plea of *res judicata* (so called).

Fifth. That the Supreme Court of the State of Missouri erred in deciding that the matter of plaintiff's petition or bill of complaint in this case, had been adjudicated in the ejectment suit of Gibson v. Chouteau, reported in 13 Wallace, U. S. S. C. Rep., p. 92 and following.

Sixth. That the Supreme Court of the State of Missouri erred in deciding, after the ejectment suit of Gibson v. Chouteau (13 Wall. 92) had been heard in this court, and this court had remanded the same, declaring amongst other things, that the equitable title of Chouteau and his heirs under the laws of the United States, *had not* been presented by the record for examination or adjudication, that such equitable title *had been presented* by the record, *and had been adjudicated*, thus disregarding and *reversing* the ruling of this high court therein. And pretending that the opinion of itself (the Supreme Court of the State of Missouri), concluded all controversy, superseded all argument, and con-

stituted what said Supreme Court of the State of Missouri was pleased to term, *res judicata*.

Seventh. That the Supreme Court of the State of Missouri erred in confounding an opinion by it, given in 1866, respecting the interpretation of the Statutes of the United States, which opinion was, and is, not only in conflict with numerous other opinions of the same Supreme Court of Missouri, both before and since 1866, but in flat contradiction of the uniform course of the decisions of this high court, with the judicial determination of a *matter of fact*, properly in issue between litigant parties.

Eighth. That the Supreme Court of the State of Missouri erred in deciding that an opinion upon a matter of law delivered during the trial of an action of ejectment was equivalent to, and identical with a judicial determination of a matter of fact between litigant parties.

Ninth. That the Supreme Court of the State of Missouri erred in refusing to the plaintiffs, who showed themselves clothed with an equitable title under the laws of the United States to the land in controversy, the benefit of that equity on the ground and pretence that the said equity had been adjudged against plaintiffs in a certain cause, although the high court had expressly declared in the very case cited by the Supreme Court of the State of Missouri, as shown that such equity had not been adjudged, had not been presented at all, and was incapable of adjudication therein.

Tenth. That the Supreme Court of the State of Missouri erred in refusing to the plaintiffs the equitable relief to which they showed themselves entitled under the laws of the United States, and in not entering a decree in their favor accordingly.

GLOVER & SHEPLEY,
For Charles P. Chouteau, Plaintiff in Error.

POINTS AND AUTHORITIES FOR CHARLES P. CHOUTEAU, PLAINTIFF IN ERROR, BY GLOVER & SHEPLEY.

To maintain the jurisdiction of this court it will be necessary to show what issues were made by the *pleadings* and what was the action of the State Court.

The Circuit Court of the city of St. Louis in which the plaintiffs suit was commenced and decided, made no specific disposition of any issue—in fact found no verdict—but simply ordered that (Rec. p. 35,) "*the petition or bill of complaint of said plaintiffs be dismissed.*" The defendant Gibson insisted that the Supreme Court of the United States, in 13 Wallace, p. 92, *Gibson v. Chouteau's* heirs, had conclusively adjudged that the plaintiffs had no equitable title or interest in the land sued for; and the Circuit Court without finding an issue or a fact dismissed plaintiff's petition. (Rec. p. 35.) *Ergo* decided against the plaintiffs' claim of right. The court of appeals affirmed this judgment. (Rec. p. 255). The Supreme Court of Missouri affirmed the judgment of the court of appeals. (Rec. p. 265.)

So that the State Courts denied the plaintiffs claim of right under the law of congress.

The opinion of the Supreme Court of Missouri shows that it adopted the decision it had rendered in 39 Mo. 536, as a final adjudication against the plaintiffs' equities; tho' the Supreme Court of the United States decided in 13 Wall, 92, Gibson v. Chouteau's heirs, that they were not in issue at all; and declared its own opinion in 50 Mo. 85, Gibson v. Chouteau's heirs, that the judgment it there rendered was *res judicata*.

FIRST. THE PLEADINGS SHOW THAT FEDERAL QUESTIONS WERE RAISED AND DECIDED AGAINST THE PLAINTIFFS.

The purpose of the plaintiffs' petition was to have decreed to them 64 acres of land, which they claimed under a New

Madrid certificate and location. They based their claim upon the Act of Congress for the relief of sufferers by earthquakes in New Madrid County Missouri, approved February 13, 1815. On plaintiffs' construction of the statute and acts done by authority of the United States, they were entitled to recover the land in controversy. On the construction put by defendant on said statute and acts, the plaintiffs had no right to the land. The State court decided against the plaintiffs' claim of right.

The record shows that in order to defeat the plaintiff's action, the defendant attempted to show that the matter of plaintiffs' petition had been in issue in another action between the same parties and adjudged against plaintiffs, and to maintain this defence he put in evidence the record of a suit between the same parties, in which he claimed that the State court had decided that the same matters were in issue and had been adjudged against plaintiffs.

It also appears that the plaintiffs claimed by the same record that the matters in issue in this suit were not in issue and not adjudged in that suit. And to maintain their claim they produced and relied upon a judgment opinion, and mandate of this court appearing in the same record produced by defendant to show that the matters in issue in this suit were not in issue in that suit and the question being whether the authority of this court or that of the State court was paramount; the State court decided against the plaintiffs' claim, disregarded the authority of this court, and pronounced its own judgment *res judicata*.

If we show the matter to be as stated, this court has jurisdiction.

See 6 Wall. 142, Rector v. Ashley.

1 Wall. 116, Bridge, etc. v. Hoboken Co.

8 Wall. 44, Furman v. Nichol.

16 Peters, 281, Armstrong v. Treasurer of Athens Co.

10 Pet. 368, Crowell v. Randall.

20 Wall. 627, Murdock v. City of Memphis.

SECOND. UNDER THE LAWS OF THE UNITED STATES THE OWNER OF A NEW MADRID CERTIFICATE AND LOCATION HAS AN ASSIGNABLE INTEREST IN THE LAND PRIOR TO THE RETURN OF THE SURVEY TO THE RECORDER.

This proposition is deniedb y defendant. It presents the main question in the cause. To show its materiality we state: the application to locate the certificate for 640 acres of land was made by Christian Wilt, the owner in 1818; in the same year the survey was made, but not returned to the recorder till August 10, 1841.

In the meantime the title of Wilt was transferred to Henry Clay; by Clay to the heirs of Wm. McRee; by them to Samuel McRee, and by Samuel McRee to Pierre Chouteau, the ancestor of plaintiffs. The deed of Samuel McRee to Chouteau was without warranty, and passed only such title as he had. After this the survey of the tract was returned to the recorder, and the question is, did the deed of Samuel McRee made to Chouteau before the return of the survey, pass an interest to Chouteau? Had McRee an inchoate title which he could convey prior to the return of the survey? We hold that he had, and did pass it to Chouteau; and we deny the right of defendant who derives title from Samuel McRee to repudiate that conveyance.

We ask the court to decide that the owner of a New Madrid certificate who locates it on public land subject to sale, and has it surveyed, secures an inchoate title to the land which he may sell and convey prior to the return of the survey to the recorder.

THIRD. THE INCHOATE RIGHT OF SAMUEL MCREE AND PIERRE CHOUTEAU.

The certificate No. 150 was property in the holder prior to its location, for it could be located or sold.

3 Wash. R. Prop. 181.

44 Maine, 57, Moody v. Hutchinson.
15 Peters, 93, Brush v. Ware.
4 Ohio, 458, Reeder v. Bart.

How could it cease to be property because notice of its location was given in the office of the surveyor general? How could it cease to be property because a survey of it, No. 2498, was executed by the surveyor general? If the certificate and survey were property in the locator, prior to the return of the survey into the recorder's office, they were the proper subjects of sale and assignment. After the notice of location was given and the survey had been made on the ground, neither the certificate nor the survey ceased to be property; they were still property, but they had a new feature; they attached to the land in question, not as a full title yet, but as a right by following up the other steps of the law to get a title to the land. When it is said a New Madrid certificate, notice of location and survey are not a title to the land, we admit it. But when it is said that these muniments give the holder no right to get the land, no interest in it, we deny it. The difference is this: Any one who has these muniments can proceed according to law by two more steps and secure the land. One who has them not, cannot do this The difference is great. One who has the certificate, notice of location and survey, has something he can sell or pass by descent or devise to his children; but one without them has nothing.

What was the status of Samuel McRee when he sold the 64 acres to Chouteau? He had the certificate No. 150, the notice of location of 1818, the survey of 1818, and a series of conveyances from O'Carrol down to himself. All he had to do was to take the survey 2498 from the surveyor general's office to the recorder's office, ask for the patent certificate and secure his title. The office of the surveyor general and the office of the recorder have been most generally kept in adjoining rooms. For a long time they were kept in the same room. This was the fact when Samuel McRee

sold to P. Chouteau the 64 acres of land in dispute. That sale was in these words: —

"Samuel McRee and Mary McRee, in consideration of $150 to them in hand paid, have bargained, sold, released, quit-claimed and conveyed unto Pierre Chouteau, Jr., and his heirs, the following tract of land (metes and bounds) containing the quantity of 64 acres, being part of a tract located under a New Madrid certificate issued to James Y. O'Carroll, or his legal representatives, to be taken off the western end of said tract, and is the same parcel of land conveyed to said Pierre Chouteau, Jr., by Robert Wash by deed, etc."

What then did McRee sell and convey? Evidently, at least, the right to take the steps mentioned and have the title. This right so held by McRee and sold to Chouteau was a present right in respect to the land, which no one but Chouteau and McRee held. It was a right in and to the land; it was a title bond of the government that by complying with law McRee should have the title. It was a *pre-emption* excluding all others from appropriating the land, and it was given and secured by law. This could not be less than an interest in the land itself at the time of the conveyance.

The course of adjudication has been to recognize it as an interest in the land as much as a title bond made by any vendor to a vendee is an interest in the land, or a pre-emption right is an interest in land against the government.

In 9 Mo. 323, Hill v. Groom, the court held the United States to by its laws and officers appointed for the purpose, a mere landed proprietor, contracting to sell its lands, and bound by its contracts just as any other person is bound by a contract.

There is no question of the soundness of this doctrine, when a person applies to the proper officer of the United States to purchase its lands according to any mode of application allowed by its laws, the application is a legal act and has a legal effect and of necessity creates an inchoate right in the applicant. The laws do not allow two applica-

tions to be granted for the same land. The fact that one only can be allowed implies that the allowance of one excludes another

This must create a right in him whose application is allowed. As between A. whose application is allowed and B. whose application is rejected, A. has a right to the land. As to all other persons A. has a right to the land. The law of the United States provides in such a case that on complying with its requirements A. shall have this land. In other words, the United States has given its bond to the effect that if A. complies with the law he shall have the land.

Let us suppose now that A. complies with the law, has the land surveyed as the law requires it, pays the purchase money or surrenders the warrant or script, which the government has agreed to receive in exchange for the land, is not his title equitably perfect? Unless it be so, the sale of our public land is not a matter regulated by law, but is the result of acbitrary power, caprice, or fraud.

Such is not the course of adjudication. Every step which the law directs to be taken in the purchase of lands has always been held to create right.

In 17 Mich. 338, People v. Pritchard, an application was made to enter land subject to entry with money tendered. The officer refused to allow the entry and was compelled by mandamus to allow it. Why? Because the application secured a right to the land.

In 2 S. & R. 394 Lilley v. Paschal, it was decided, the title commences with the application.

See also 7 Pa. 75, Dull v. Heath.
22 Pa. 398, Shoenberger v. Baker.
1 Bibb, 95 Black v. Bolls.
1 Bland Ch. 299, Cunningham v. Browning.

In this case it is said the first application designating the particular land desired is a title to it.

7 Pa. St. 75, Mix v. Smith.

3 S. & R. 333, Bechel v. Rhoades.
6 S. & R. 130, Moore v. Shover.
34 Pa. 74 Whorabont v. Entriken.
4 Wash, 74, Dubois v. Newman.
1 Ind. 339, Mayer v. McCullough.

In this case the warrant was received and afterwards the same land sold and patented to another; but the warrant held the land against the patent.

See 1 Wheat. 130, Matron v. How.
11 Mich. 200 Merrill v. Hartwell.
8 Min. 395, Johnson v. Gilfillan.
17 Tex. 41, Hollingsworth v. Hallhower.
3 Yerger, 423, Tipton v. Miller.

There is no point of time from the very first step in an incipient title to its consummation at which there is not a right in the claimant which may be sold, passed by devise or inheritance, or subjected to the rights of creditors. The assignment of a land warrant conveys an equitable title to the located land.

1 McLean, 533, Ware v. Brush.
15 Pet. 93, Ware v. Brush.

A New Madrid warrant is real property and descends to heirs.

4 Mo. 106, Bryant v. Wear.
5 Mo. 179, Tindall v. Johnson,
5 Mo. 147, Bryant v. Wear.
4 Blackford, 476, Shanks v. Lucas.
5 Porter, 243, Goodlet v. Smithson.
6 Porter, 84, Wright v. Swan.
6 Mon. 175, Adams v. Logan.

3 Washb. R. Prop. 198, 4th ed., says the patent relates to the inception of the title and the person who first appropriates the land has the right.

44 Maine, 57, Moody v. Hutchinson.

"A land warrant is an *executory contract*, one step in the progress of title; though of itself it is neither lands, tenements or hereditaments."

3 Washb. R. Prop. 144, 4th ed. says: "It has been held that a purchaser from the United States by an act of entry and payment acquires *an inchoate* legal title which may aliened, will descend and may be divested in the same manner as any other legal estate; that an estate held by one after certificate of final payment is made, may be taken on execution before patent is issued; that land held by entry descends to heirs or may be devised; that if one entitled to a *certificate* or patent under the law of congress dies, the *certificate* or patent issues to his heirs.

An assignment of part of a land warrant gives a part of the location.

3 McLean, 56, Lewis v. Baird.

If a grantor has an equity and sells it the legal title will belong to the vendee.

44 Barb. 239.

The imperfect title being sold by the owner the patent title passes also.

11 Wis. 3, Haywood v. Ormsby.

An equitable title is simply a right to the legal title.

11 Wis. 3, Hayward v. Ormsby.

10 Ga. 557, Dugas v. Lawrence.

The draw in a lottery not yet drawn may be sold, and the right to the land when drawn will pass as a contingent possible interest.

27 Geo. 418, Tennant v. Blacker.

This sensible doctrine is recognized in 21 How. 228, French v. Spencer. The facts were these, Forsgit held a soldier's land warrant for 320 acres and sold the *land* men-

tioned in it to Spencer, and authorized him to locate it and take the patent in his own name, by writing dated June 28, 1816; the patent issued to Forsgit October 26, 1816. The court would not hold that the sale of the land was void because Forsgit had no title, neither because the warrant had not been located; nor because there were no metes and bounds of description. The court held:

1. That the conveyance had a double aspect obviously, for the reason that the parties to it did not know at the time it was executed whether or not the land had been located by Fosgit's agent.

2. That the description was to the same effect as if the grantor had said, "I convey the land covered by my warrant of three hundred and twenty acres," and was sufficient. (In the case at bar McRee said, I convey the land *located by the warrant*).

3. That "the deed was a valid conveyance of Fosgit's interest in the land *at the time it was executed*.

4. That as there was no opposing title the patent related back to the entry and took date with it.

5. That though there were no covenants in the case (and so there are none in the case at bar), the grantor, Fosgit, had by recital claimed to own and sell 320 acres of land; and a patent for that land which he had sold having issued to him he, Fosgit, was estopped from saying he had not sold the patent.

This opinion was delivered by Mr. Justice Catron, the same who decided Bagnall v. Broderick, 13 Pet. 436, and who never supposed there was any conflict in the doctrine of the two cases.

In 21 How. 228, the deed conveyed the 320 acres of land mentioned in the warrant on the 28th of June, 1816; but without any reference to the land on which it was located; and that was held a valid conveyance of the located land. In this case the deed conveyed 64 acres, part of 640 *located* by the warrant but without in terms conveying the warrant; and this is alleged to be void.

If, as the court said in 21 Howard, 228, the conveyance of the land as in the warrant, without more, passed title to the land as *located*, why should not the conveyance of the land, as and when located by the warrant, pass title to the warrant before location? If in 21 How. 228, the patent when issued related back to the inceptive act, why should it not so relate in this case? Had the patent issued to Samuel McRee it would have enured to Chouteau. This is the reason why it was issued directly to Mary McRee.

If Fosgit was estopped because he stated in his deed he had obtained a warrant for 320 acres of land which he sold; why not Samuel McRee be estopped because he stated that the 64 acres of land he sold was already located by a certain warrant?

He was estopped; and could not have held under a patent to himself. Hence it was issued to Mary McRee.

It is contended that Bagnall v. Broderick, 23 Peters, 436, is an authority for the doctrine that in a case where there is only one patent and only one location, or title before the court, that one who owns the New Madrid certificate and proceeds to locate it by notice to the surveyor general and by a survey, but who sells the land before the survey is returned into the recorder's office, passes no right to the land. The fact is, no such thing is even hinted in the case; no such thing was before the court.

In that case *Morgan Byrne* gave notice of location, as the legal representative of Jno. Robertson. The patent issued to Jno. Robinson. Byrne had no patent. He claimed to own the warrant and to have "located the land" as we do here; and that he ought to have had the patent as we claim here. The court decided that even if he owned the land and warrant, his equity would not prevail against the patent to Robertson in an ejectment; but he could have relief in equity. And this was the only question before the court to be decided.

The New Madrid certificate issued to John Robertson, September, 1818, the notice of location was given to the

surveyor general by Byrne, October 8, 1818. There is nothing in the case to show when the survey was made. The patent issued to John Robertson, June 17, 1820. There was no conveyance of the land covered by the warrant between its date and the date of the patent. It is true the opinion says: "The United States never deemed the land appropriated until the survey was returned, for the reason there were many titles and claims perfect and incipient, emanating from the provincial governments of France and Spain and from the United States." "So there were lead mines and salt springs excluded from entry. Then again the notice of entry might be in a form inconsistent with the law." Now, all this means, simply that such preliminary steps if erroneous could be set aside. The same is true of the patent certificate, and even of the patent which has been considered liable to recall at the land department. Maguire v. Tyler, 8 Wall, 650. Nothing is said in the opinion to the effect that the steps preceding the return of the survey into the recorder's office, give no right or title to the land when these steps are all correctly taken. It was not decided that a sale of the land as surveyed but before the return of the survey is invalid. But the very contrary is stated in the opinion. The opinion proceeds: "If no such objection existed *it was the duty of the surveyor* to conform to the election made by the claimant having the location certificate from the recorder." Why? Is it possible the court could have meant that the notice of location and survey, in case there was no legal objection to them, gave no interest in the land? Why are these muniments to be carefully preserved and recorded? Why are they made at all unless they confer property rights?

But the court proceeds to say: "If Byrne's devisees can show him to have been the true owner of the 750 arpents of land * * * injured by earthquakes, and that the patent issued to John Robertson, Jr. by mistake; then the equity side of the court is the proper forum, and a bill the proper remedy to investigate the equity of the parties."

It is, therefore, apparent that although the process of procuring a title to land from the United States may be interrupted by certain legal objections, the land not being subject to sale for different reasons, and although the government has a right under its laws to rescind a sale in such cases, and does not regard the land as definitively sold till all such questions are settled, nevertheless this is a matter between the purchaser and the government. As between the purchaser and the government the title is not perfect; but as between the purchaser and third persons the purchaser is the owner of the land, may sell it, devise it, pass it by descent; as between the purchaser and the government the purchaser is the owner, provided the purchase is not set aside, and if not set aside the patent will relate to the first step.

8 Minn. 395, Johnson v. Gilfillan.

One holding an incipient title is owner against all the world but the government.

7 Pa. 85, Dulle v. Heath.

33 Pa. 455, Troutman v. May.

The holder of such a title cannot survey it and sell it, and then abandon it to the injury of his assignee.

25 Texas, 594, Smith v. Tucker.

2 Iowa, 1, Arnold v. Grimes.

3 How. 450, Carroll v. Stafford.

If in the sale of its lands the government contracts like a private citizen, it is very clear that the purchaser acquires a property right in the land long before any conveyance by a patent.

16 Mo. 129, Brant v. Robinson.

26 Mo. 364, Lumly v. Robinson.

Bearing in mind that the United States in the sale and disposition of its lands is like any other proprietor, its laws

constituting the terms and conditions of its contracts, and that it is the duty of the courts to enforce the rights of persons purchasing these lands according to the terms of the contract; it is certain that at the date of McRee's deed to Chouteau, McRee had an equitable interest in the land and passed it to Chouteau by his deed.

We look upon the matter in this way. McRee was the owner of certificate No. 150 and survey 2498; the contract between him and the government was this: If McRee would comply with the law, the government would issue the patent to him. This was the contract on the part of the government; we may say the title bond which McRee held. The purchase money for the land was already paid. The certificate No. 150 which the government had agreed to receive in payment was already delivered to the government. In such a case the ruling is, without exception, that the purchaser (vendee) of lands has an interest, a title to the land, which he can sell and convey, devise, pass by descent to his heirs, and which may be seized on execution.

16 Mo. 129, Brant v. Robinson.
26 Mo. 364, Lumly v. Robinson.
7 Ala. 115, Land v. Hokins.
9 Cal. 137, McKean v. Bislee.
Hardin, Ky. 19, Thomas v. Marshal.
15 Ala. 9, Falkner v. Leith.
5 Humph. 581, Heffly v. Hall.
6 Humph. 281, Lee v. Crossman.
6 Ga. 452, Pitts v. Hendrix.
25 Maine, 317, Woodman v. Bodfish.

There can be only one valid objection to the force of these decisions. If it can be shown that the rights of purchasers of lands from the government are not dependent on contract, but upon the arbitrary will and caprice of the land officers, then titles must vest or not as they please. No one has ever supposed that property in the public lands depends upon anything but contract.

In Soulard *et al* v. United States, Chief Justice Marshall said, "the term 'property' as applied to lands comprehends every species of title, inchoate or complete. It embraces all those rights that lie in contract, those that are executory, as well as those which are executed."

4 Peters, 512, Soulard v. U. States.

The same doctrine is sustained in 4 Peters, 332, Galt v. Galloway. A land warrant may be assigned and the assignee will hold the land located by it (p. 339). Every step in the progress of locating land is an advance toward the acquisition of title (p. 341). No one can withdraw the location to the injury of an interested party (p. 341). On the death of the owner of a warrant it descends to his heirs (pp. 343-5).

An unconfirmed Spanish grant has never been regarded as a title to land. Claim is the strongest term ever applied by the courts to such a pretension. But the fact that it has always been held as no title against the government, never prevented its being sold by the claimant, or seized on execution, or descending to the heirs of the deceased claimant.

27 Mo. 445, Papin v. Massey.
12 Mo. 254, Landes v. Perkins.
10 How. 348, Landes v. Brant.
8 Wal. 650, Maguire v. Tyler.

While a claim is pending for confirmation, and *while it is no title* against the government to any land, the land covered by the claim has always been held to be property alienable by voluntary or involuntary sale, and devisable or descendable to be the claimant's heirs; and whoever has taken a *title* in this way has been afterwards regarded as the claimant, and if the claim was matured into title it has been held to belong to that person.

See 12 Wall, 358, Smith v. Sheely.
21 How. 228, French v. Spencer
33 Cal. 225, Bloodworth v. Lake.

16 Louisiana 201, Stenspey v. Bennett.
27 Md. 149, Stallings v. Ruby.
22 How. 340, Berthold v. McDonald.
3 McLean, 107, Ashton v. Hammond.
2 Ohio St. 216, Stubblefield v. Boggs.
26 Texas, 150, Gloscock v. Nelson.
18 Cal. 570, Seever v. Clark.

The case of Gibson v. Chouteau, 39 Mo. 536, is the only authority in the world to the effect that the right to land in process of location is incapable of alienation.

We shall not dispute the authority of cases which say that *certain preliminary steps* in the acquisition of title to public lands do not, if no more is done, confer title; we may agree that in case of a New Madrid location as opposed to another grant, no title permanently vests till the return of the survey into the recorder's office, or until patent is issued. But this, we say, only means that if the preliminary steps are not approved by the United States, and for reasons they may be set aside; it cannot mean the preliminary steps are void. It does not mean that if the preliminary steps are approved, they did not create interests in the land. It does not mean that an assignment of the warrant, or notice of location, or survey of land covered by them, would not transfer an equitable title to the land, in a case where there is no conflict with another grant and these steps are finally approved.

The law provides that a certificate of new location, a notice to the surveyor general, a survey, a return of the survey, and a patent certificate, shall in every case precede the patent. To hold any of these several facts immaterial or worthless, is to make the law immaterial and worthless. We admit that they may all take place for the purpose of appropriating the land and yet be rejected so that no patent will ever issue; and that is what Bagnall v. Broderick, 13 Peters, 436, means. But we say that if they are approved, and a patent issues upon them, they must be considered ap-

propriative acts. If not, then an assignment of a warrant, or notice of a location or survey, must be void, nor can we see why the warrant is not void also. There is a sense in which no title is understood to pass before the confirmation of a Spanish or French claim; the return of the survey of a New Madrid warrant into the recorder's office; or the emanation of a patent upon an entry, and as between the claimant and the United States, this is true. There may be reasons why a claim shall not be patented, hence, it is said, such inchoate claims while unconfirmed have no standing in law or equity and give no title.

16 How. 48, Burgess v. Gray.

3 How. 460, Carroll v. Safford.

Yet, notwithstanding this language, it is universally true that all these claims can be sold and conveyed at any time after they incept, and the assignee will hold and own them provided they are finally accepted by the government and a patent issued. That is, the claim as between the claimant and the world is considered valid and may be dealt with as other property; but as between the claimant and the government it is not conclusive, and may be rejected for lawful reasons.

It is universally true that the very earliest steps toward the procurement of title in such cases are held to confer rights which a court of equity regards as valuable and sacred and which of course it protects.

In 22 How. 340, Berthold v. McDonald, the Supreme Court of the United States held that when two patents issued and did not show who had the better equitable title, the court would have to go to preliminary steps; and to find the oldest equity must go to the oldest preliminary step.

In 45 Mo. 584, Carpenter v. Rannells, the court held that the Spanish claimant prior to confirmation, had an equitable title which he could sell, and upheld such a sale by its judgment.

In 21 How. 481, Fenn. v. Holme, the Supreme Court of the United States held unanimously that a New Madrid warrant and notice of location and survey as to which no return had been made into the recorder's office, and no patent certificate had issued, *was an equitable title to the land surveyed* under the laws of the United States.

This is precisely what McRee had, when he conveyed to Chouteau: that is an equitable title. He conveyed this equitable title. The claim passed on in Fenn v. Holme was this very O'Carroll location.

In 1 Yeates, 518, Lynn v. Downs, it was decided that an application to enter land is an equity in the applicant. That though the title is in the government, a use is raised by the application which a court of equity will protect; and the patent relates to the date of the warrant.

3 S. & R. 333.

In 5 Yerger, 102, Porter v. Porter, the Supreme Court of Tennessee held that when a warrant has been laid upon land, and the holder had sold his interest in the land, he had no power to lift the warrant to the injury of the vendee.

1 A. K. Marsh, 507, Cobb v. Thompson. The assignor of an entry is not bound to carry the claim into patent, but if he does he holds the land as trustee for his assignee.

And this is why Mr. Gibson had the patent issue to Mary McRee. It would not do to issue it to Samuel McRee's representatives.

21 Ark. 9, Conway v. Kenworthy.

It is not true then that Samuel McRee who held the New Madrid warrant No. 150, the notice of location under it, the survey 2498, and nine conveyances from prior owners, with their covenants, and who had the legal right to hand the survey into the recorder's office at any moment, and take the patent certificate, had no interest in the land which he could assign to Chouteau. On the contrary, when he sold and conveyed to Chouteau, Chouteau took his place as

claimant just as any other assignee of an inchoate claim would take it, and thereby took the right to any consummate title into which the claim could be carried in the name of any one under whom he claimed; and the claim so conveyed by McRee was a then present interest in the land, and the patent had it issued to Samuel McRee would have been Chouteau's patent as to the 64 acres, by a legal title.

If we have shown that at the time of McRee's deed to Chouteau, McRee had a vested equitable title to the land, there is an end to this controversy. No one will contend that a purchase of an equitable title does not pass to the purchaser the future legal title in equity. You might as well contend that the purchase of a calf will not give a right to the cow when the cow has grown up from that same calf. That the purchase of a sapling does not pass the tree when the sapling has become a tree.

If we have shown that the warrant, notice of location and survey is an equitable title before the return into the recorder's office, we need not trouble ourselves with the question of "location," as mentioned in 13 P. 436, Bagnall v. Broderick, and other cases.

FOURTH. SAMUEL MCREE BY HIS DEED TO CHOUTEAU WAS EQUITABLY ESTOPPED TO DENY THAT THE LAND SOLD WAS LOCATED AT THE DATE OF THE DEED.

Let us concede that Bagnall v. Broderick means, as defendant claims, that no right or interest in the land of any sort vested in McRee until the survey was returned into the recorders office. That is, that the return is *the location*.

Well, then, we insist that McRee cannot deny that the land was located, cannot deny that the return had been made at the date of his deed to Chouteau.

We say that McRee contracted with Chouteau that the land was then located, and is estopped to deny that the survey had been returned into the recorder's office.

The deed says *the location was made*. The deed specifically and positively recites the fact that the land conveyed had been located by New Madrid certificate No. 150, issued to James Y. O'Carrol.

We say the law holds McRee to the fact recited in his deed, and neither he nor his assignees can question the recital for the purpose of disturbing Chouteau's title; and had a patent issued to Samuel McRee, Chouteau would have had the legal title.

Recitals of facts by deed bind and estop parties and privies. A party can dispute no fact recited in his deed, nor in any deed under which he claims.

7 Conn. 214, Stow v. Wyse.
13 Ver. 158, Green v. Clark.
4 Cal. 247, Redmond v. Bella.
32 Mo. 290, Clamorgan v. Greene.
11 Mo. 118, Joeckel v. Eaton.
47 Mo. 360, Durrette v. Briggs.
4 Peters, 83, Cawer v. Jackson.
13 Wen. 138, Jackson v. Waldron.
11 How. 297, Van Rensalear v. Kearney.
6 Peters, 598, Crane v. Morris.
9 Mo. 156, Dickson v. Thompson.
4 Binney, 237, Penrose v. Griffith.
3 Binney, 179, Barnett v. Deserbaugh.
5 Wall. 795, Denny v. Craig.
11 Mich 232, Johnson v. Scott.

Both parties claimed under a deed reciting the plat recorded, and both were estopped.

The land sold to Pierre Chouteau, Jr., by Samuel McRee was land located by certificate No. 150. The deed on its face stated that the identical 64 acres were *already located* by said certificate. The statement put into the deed of McRee was one of the greatest importance. Mr. Gibson says here that the title of Chouteau depends on that deed. It was then a material part of the contract of sale that the

land conveyed *was then located*, and McRee was estopped to say it was not located at the execution of the deed. This estoppel removes the objection that the survey was not returned into the recorder's office, and establishes conclusively that the deed passed an equitable title to Chouteau at the delivery of it.

An equitable title is simply a right to demand the legal title, and when McRee conveyed to Chouteau this equitable title, he conveyed the right to the legal title when it should emanate.

FIFTH. IF IT BE TRUE THAT NO TITLE VESTED IN MCREE UNTIL THE RETURN OF THE SURVEY INTO THE RECORDER'S OFFICE, AND THAT MCREE HAD NO MORE THAN A CHANCE OR POSSIBILITY THAT SUCH RETURN WOULD EVER BE MADE, STILL THE DEED OF MCREE PASSED THE TITLE WHEN THE RETURN WAS MADE.

It is contended that at the date of McRee's deed he had no right to the land in question, that the warrant, notice of location, survey, etc., gave no rights and were mere idle acts. That the only legal appropriative act was the return into the recorder's office. That whether that return would ever be made was a matter of chance. That McRee had no right to enforce it; was dependent solely on the whims and caprices of the land officers and the mercy of God. That, nevertheless, it was possible such a thing as the return of the survey might happen; and if so, then only McRee had a right.

Conceding that McRee had only such possibility or expectancy we shall contend it was a subject of sale and conveyance. The principle is this. When a person conveys property in which he has no present vested interest, but really has a possibility of interest in the future, the deed though void at law is held in equity to have been intended to operate on the future, possible, expectant interest.

We do not believe that McRee had no present interest. To our minds, in view of the uniform course of judicial decisions, the suggestion is absurd. The idea that persons taking incipient steps to purchase lands from the United States have no legal rights by force of those steps, but only chances and possibilities, springing out of the arbitrary or accidental omissions or commissions of public officers is absurd.

But this is the doctrine pressed upon us. That at the time of McRee's conveyance to Chouteau he had only a possibility of interest in connection with the survey getting into the recorder's office. That McRee had no legal right to such a thing. Still it might possibly happen, and this was all he had in the land.

Now, we say, taking this to be so, this possibility was an interest in the land, and his deed passed it to Chouteau in such manner that when the survey did get into the recorder's office Chouteau held the land.

The doctrine of equitable assignment is a large and important branch of the law. When steps are being taken, or events are possibly to happen, whereby a right is expected to vest in some particular person, but has not yet attached in favor of this person to a certain piece of property and a sale and conveyance of this property is made while it is this condition, the doctrine of equitable assignment, is that, because there is no present interest in the grantor, no actual right *in esse*, the deed shall be considered an agreement to convey to the grantee the right as soon as it vests; that is, comes *in esse*.

2 Story Eq. § 1040, says: "Courts of equity give effect to assignments of trusts and possibilities of trusts, and *contingent interests and expectancies*, whether in real or personal estate and chooses in action. Every such assignment is considered in equity as in its natnre amounting to a declaration of trust and an *agreement* to permit the assignee to make use of the name of the assignor in order to recover the debt or reduce the property into possession. Contin-

gent rights and interests are not ordinarily assignable at law; yet they may sometimes be assigned at law if coupled with a present interest."

"But the reach of this doctrine at law falls far short of that now entertained in equity. To make an assignment valid at law the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments, not only of choses in action and contingent interests and expectancies, but of things which have no present, actual or potential existence, but rest in mere possibility not in deed as a present positive transfer, operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*."

He says further (§ 1040 C): "Contingent interests and expectancies may not only be assigned in equity but may also be the subject of a contract of sale when made for valuable consideration, which courts of equity after the event has happened will enforce. Indeed the same effect takes place in such cases if there be an actual assignment; for in contemplation of equity it amounts not to an assignment of a present interest, *but to a contract to assign when the interest becomes vested.*"

Let us concede, we say, that at the time of the conveyance to Chouteau by McRee, the interest of McRee in the land was contingent; it might not be matured into a right; the return of the survey into the recorder's office was uncertain; if returned, its approval was uncertain, and the issuing of a patent certificate was a simple future expectancy to which the locator had no absolute right, and in this condition of the claim it was sold as land in course of location by the warrant; the effect of it was to bind McRee to convey the title when located. It is important to observe that every equitable assignment makes the assignor a trustee for the assignee.

In 46 Barb. 84, Stover v. Eyclesmyer, it was held that a son, heir apparent to a father, had no interest in his father's estate; but he had a contingent future interest, an expectancy of interest, and if he sells and conveys by deed, for valuable consideration, that interest, and the father die without a will, so the heir takes equity will enforce this deed as an agreement to convey.

There is no difference in principle between the interest of the expectant heir and that of the expectant locator of land. The applicant is as distinctly a defined person as the heir, the event which make the interest expectant and not present are of a like kind. In the one case the heir's right waits upon the death of the parent without a will; in the other, the location waits upon the return into the recorder's office and its approval. In one case the inheritance is conveyed; in the other, the location, and the event in either case is dependent upon an uncertain but possible future event. In both these cases we may concede there is a want of a fixed present interest; and the interest of the vendee is secured by treating the transactions as an equitable assignment.

In 26 Texas, 150, Glascock v. Nelson, the owner of a headright league square before location sold parts of it by deed, agreeing to convey after location: the deed was treated as an agreement in equity to convey.

In 21 How. 228, French v. Spencer, the court said there is an inchoate equity to land before the patent vendable under execution and right by the owner, which courts of equity will recognize.

33 Cal. 355, Bloodworth v. Lake.

A. located a warrant, then sold his right, title and interest to B., afterward took out a patent in his own name; his deed was regarded in equity as a contract to convey to B. after the patent issued.

A sale of such an interest as a man can recover is a possibility or expectancy, and will be enforced as an agreement to convey.

3 J. J. Marsh, 13, Breckenridge v. Churchill.

A sale of an expectancy by deed will be enforced as an agreement to convey when the thing is obtained.

2 Hill Ch. 235, Alston v. The Bank.

2 Story, 630, Mitchell v. Winslow.

No particular form of words is necessary to the transfer of an expectancy. It is usually by deed, but the deed is enforced as an agreement to convey, thus, a legacy, the future cargo of a ship, or future interest in lands, tenements and hereditaments.

3 White & Tudor's Lead Cases Eq. 307-308.

4 Kent, 261.

7 Texas, 26, Nimmo v. Davis.

40 Pa. St. 37, Baylor v. Com.

46 Barb. 84, Stover v. Ecclesmyer.

44 Barb. 239, Doyle v. Peerless.

17 How. 353, Hinckle v. Wanzer.

The assignment of a thing in which the vendor has a mere possibility is an agreement to convey the thing when realized.

In 39 Mo. 567, Gibson v. Chouteau, this claim of McRee was said to be "*nothing to grant*," "*only a possibility*." If such it was it passed by equitable assignment to Mr. Chouteau.

44 Maine, 57, Moody v. Hutchinson, says a land warrant is an executory contract, which may be converted into lands; but it is neither lands, tenements, or hereditaments. Then we say it is a contingent interest, it is a possibility, an expectancy in any land on which it is laid.

In 20 Mo. 506, Page v. Gardner.

A thing not yet *in esse* was sold; held this is an agreement to convey the thing when it comes *in esse*.

It must be understood that the doctrine of equitable assignment will secure to the assignee of the prospective claim only the benefit of the same identical claim when matured. It will not reach another and different claim. We do not contend that when Samuel McRee sold and conveyed to Chouteau the land located by the warrant No. 150, Chouteau could get thereby any more than such patent as should be granted to McRee or his assigns, on account of *his then ownership* of the warrant, or possibility of ownership; but we do hold that by virtue of his conveyance to Chouteau, the future patent, if issued, in consideration of McRee's then claim, was equitably assigned to Chouteau.

It will be observed that in such a case, when the survey is returned into the recorder's office, or a patent certificate, or a patent has been issued, that is no new title nor after acquired title. It is the same title that was sold to Chouteau, and though there is more perfect evidence of the existence and certainty of the thing sold, it is not a new or different thing in contemplation of either party in equity. It is the same thing a little older and grown a little more.

We admit that if at the time of the conveyance McRee had not owned the O'Carrol claim, and afterwards bought it of a third person, the right so purchased would not have been equitably assigned by this deed to Chouteau. What we assert is that McRee could not sell to Chouteau his right, or possibility of right in this claim, such as he had, and then in consideration of the same identical claim which he sold to Chouteau, take a title to himself, nor transfer it to his wife.

The word expectancy embraced only what McRee could obtain by virtue of what he had when he conveyed to Chouteau.

18 Mo. 486, Valle v. Clemens.

The doctrine of equitable assignment is not limited to the principal subject of the conveyance, but extends to every collateral security, support and muniment of the thing conveyed.

The conveyance by McRee of his interest in the land, whether that interest was present or expectant, operated as an assignment of the warrant No. 150, as far as it was necessary to uphold Chouteau's claim to the 64 acres.

This is so plain a matter as to strike the mind of every one.

Suppose when McRee was about selling to Chouteau the 64 acres, he had said: "Mr. Chouteau, I sell you the land only covered by the warrant, but I will not give you any interest in the warrant itself. I retain my ownership of the warrant entirely." Chouteau would have replied, "of course; I can only hold the land by means of the warrant. It is the muniment of my title. Without that I cannot hold the land, and if you do not mean to assign the warrant to maintain the location of the land I will not bargain with you." The conveyance of McRee's interest in the land was intended to pass in contemplation of equity so much of the notice of location, warrant No. 150, and survey 2498, as was corresponding to it.

It was land already located under that certificate, which McRee claimed to own, and which he sold and conveyed to Chouteau, and for which he received the purchase money from Chouteau. It is now asserted by one who stands in the place of said McRee, that this land was not *located* at all as set forth on the face of the deed; in fact, that the deed was false, in order to defeat Chouteau's title. But this cannot be allowed by the just principles of the equitable code.

It is impossible to separate the land from the muniments of the grantor's title to it. No lawyer has ever conceived of such a thing as conveying property of the grantor and withholding from the grantee the muniments which created and upheld the right to it. It would be conceded that

if McRee had written on the the back of the certificate No. 150 an assignment like this, "I have sold to P. Chouteau, the 64 acres located by New Madrid certificate No. 150 and survey 2498, and I hereby assign to said Chouteau so much of said certificate and survey as apply to said 64 acres," the assignment would have transferred so much of those muniments, and Chouteau would have been equitable owner of so much of said certificate and survey, and consequently owner of the land when patented. But we insist that McRee's deed actually did all this.

In White & Tudor's Lead. Cases in Eq. p. 369, it is laid down as "a general rule that the purchaser of a thing is entitled to all the remedies of the seller for the recovery and protection of the thing purchased."

Chouteau bought McRee's interest in the land located by the warrant, and was thereby entitled to so much of the certificate and survey and warrant as muniments of the title purchased, and by means of which it was to be held.

6 Pick. 360, Hodges v. Hams.
13 Maine, 261, Arnold v. Elwell.
3 Met. 515, Jones v. Huggford.
2 Pa. 361, Mehoffy v. Shore.
7 Dana, 140, Gossam v. Sharp.
20 Mo. 222, McQueen v. Chouteau.

When a thing is granted, all the means for securing it and having the fruits of it are granted with it, and all deeds and covenants.

18 Barb. 80, Rood v. New York.

But McRee, it is said, sold this land as located by the warrant; yet reserved to himself the warrant which was the only means of holding the land by Chouteau. If the deed had simply conveyed the land it must have assigned the warrant; but when the deed went so far as to name that the land was located by the warrant, it is impossible to say the warrant was not sold.

cated at the time of the conveyance, or as to be located in future. If the former, then the deed passed an equitable title *in presenti*. If the latter, it passed an equitable title as soon as located. In either case the patent would belong in equity to Chouteau, and the patent could not be lawfully issued to Mary McRee.

SIXTH. THE DEED OF TANNER TO WILT CONTAINS A CONDITION AND AGREEMENT THAT MCREE SHALL CONVEY TO CHOUTEAU AFTER THE LOCATION IS COMPLETED.

By the deed of Tanner to Wilt this certificate or warrant No. 150 issued to O'Carrol, or his legal representatives, was put in trust for the benefit of said Wilt, his heirs and assigns, Tanner covenanting to convey by deed of general warranty to any future assignee under Wilt, the title when finally located. We insist Chouteau was such assignee of the 64 acres. We claim that this covenant runs with the land and bound Samuel McRee and assigns to execute a deed to Chouteau after the location was perfected, that is, after the survey was returned into the recorder's office. When Tanner made this covenant he was the owner of the certificate and had a right to control and direct the use of it and the title to the land to be located by it.

The covenant on the part of Tanner was to this effect: That he warranted to Ch. Wilt, his heirs and assigns, the land to be located by the certificate according to metes and bounds when surveyed, and he (Tanner) covenanted that when the land should be located, he, his heirs and assigns would make to Wilt, his heirs, and assigns, a new general warranty deed for the metes and bounds as located. That this covenant ran with and bound the land and all persons claiming under Wilt and Tanner according to its terms.

See 3 White & Tudor's L. C. Eq. 308, where it is said, "There can be no doubt that a covenant to charge, dispose of, or effect lands hereafter to be acquired, operates in equity on the land so acquired."

1 Mylne & Craig, 547, Metcalf v. Archbishop, etc.

Of course the effect of such a covenant by the owner on land to which he has a present title cannot be questioned.

In 18 N. Jersey Eq. 337, Brewer v. Marshall, it was decided that a covenant by a grantor at the time of his conveyance enures to the benefit of a subsequent purchaser and runs with the land.

See also 5 Wend. 603, Astor v. Hoyt.
50 Barb. 135, Atlantic Dock v. Leant.

One who accepts a deed with a condition in it, assents to it and is bound by it.

30 Barb. 292, Spalding v. Hallenbeck.
10 Leigh. 183, Taylor v. Pownal.

In this last case the condition was that the grantee should support the grantor, and it was held binding on the grantee's assignee as an agreement to be enforced.

This covenant of Tanner is substantially a covenant enforcible in equity, for further assurance providing that any assignee under him or Wilt should, after the location was perfected, have a new deed, and was made to prevent any one who should transfer the claim before the location of it from obtaining a patent to the injury of his assignee. The deed of McRee though without warranty, assigned the covenant of Tanner to Chouteau.

5 Litt. 248, Young v. Triplett.
3 Litt. 118, Cummings v. Kennedy.
27 Ills. 478, Brady v. Spurck.
1 J. J. M. 335.
6 B. Mon. 542, Anderson v. Wells.
3 Zab. 270, Carter v. Denman.
3 Paige, 546, Town v. Needham.
Rawle Covenants, 334.

Rawle on covenants says: "It is a settled rule on both sides of the Atlantic that *until breach* the covenants for

title, without distinction between them, run with the land to heirs and assigns."

4th ed., top page, 318.

We may consider Tanner's deed as his title bond to any assignee under Wilt that after the location of the land was perfected, he, Tanner and any one claiming under him, should make a new deed with warranty.

This covenant was binding on Clay, the heirs of Wm. McRee, and Samuel McRee. Had the location been perfected by Wilt or Tanner, while Clay or Wm. McRee or his heirs, held the land, any assignee under any one of them was entitled to the benefit of it.

It so happened that the survey was returned into the recorder's office August 10, 1841. The covenant then became operative on Samuel McRee, forbidding him and all claiming under him to interfere with the possession of Chouteau, and binding him at once to make a new deed to Chouteau. Samuel McRee took the land with this covenant resting on it as a muniment of his title. Had Clay got out the patent and attempted to use it against him, he could have demanded a full conveyance from Clay by virtue of this covenant. Chouteau bargained for this covenant and paid for it as a muniment of his title. Chouteau bought from McRee the land located by certificate No. 150, with a right to a new conveyance on the location perfected, whatever that might be. Chouteau got by the conveyance from McRee all the rights, covenants, claims and expectations of McRee and among them Tanner's covenant, that if he, Chouteau, bought the lands, Tanner and all claiming under him should make Chouteau a new deed after the location was perfected.

And by this covenant McRee was liable to be sued in equity and compelled to make a new deed to Chouteau.

"It is settled that courts of equity will enforce the performance of such a covenant."

Rawle on covenants, top page 657, 4th edition—indeed all chapter XV.

If Samuel McRee was bound by this covenant of the prior owner, Tanner, to convey the land when located to Chouteau, that is, to the extent of 64 acres, then Chouteau got a perfect equitable title from McRee, in fact actually held his title bond.

23 Ills. 97, Bennett v. Waller.

We hold, therefore, that on the doctrine of specific performance by force of the covenant in question, Chouteau's heirs were entitled to a decree against Samuel McRee had he set up a claim adverse to them in his life-time, and are now entitled to such a decree against Gibson.

If Samuel McRee was now living and occupying the position of Mr. Gibson, he would be a trustee for Chouteau's heirs. The trust would arise in this way: Tanner's covenant or title bond binding him and all claiming under him to make a new deed to Chouteau as soon as the warrant was located, placed McRee in the position of a vendor who who sold to his vendee, and gave him a title bond, but remained without making the title called for in the bond. Such a vendor is always held in equity to be a trustee for the vendee.

26 Pa. St. 178, Siters' Appeal.
4 Bush. Ky. 608, Gains v. Allen.
17 N. J. Eq. 165, Force v. Dutcher.
3 Md. Ch. 359, Bowie v. Berry.
44 Pa. St. 200, Reed v. Likins.

Vendor is trustee for the vendee till full conveyance is made.

21 Ark. 9, Conway v. Kenworthy.
6 Mo. 605, Treusdale v. Calloway.

SEVENTH. THE PLAINTIFFS, HEIRS OF PIERRE CHOUTEAU, HAVE SHOWN A VALID EQUITABLE TITLE THROUGH WILT, HERTZOG AND CLAY.

The record shows that "*Christian Wilt*" was the partnership name of a firm composed of Christian Wilt and Joseph Hertzog; and that Hertzog owned all the capital and effects of the firm; the land in question being partnership property, purchased with partnership funds. Hertzog, as surviving partner, was entitled to the possession of all the partnership effects, and had power to sell them to pay its debts. The separate interest of Hertzog (the whole in this case), was liable to execution and sale, and was sold and conveyed by sheriff to Clay.

Freeman on Executions, § 125.
26 Mo. p. 77, Wiles v. Maddox.
45 Mo. 487, Gilham v. Keeone.
45 Mo. 524, Rapp v. Vogel.

If Wilt had any interest to set up against the possession of Chouteau, he failed to do so and his equity was barred by limitation.

13 Wall. 102, Gibson v. Chouteau's heirs.

Indeed it is the settled local law of Missouri, that the statute of limitations vests in the occupant the outstanding title on which it operates.

13 Mo. 335, Biddle v. Mellon.
16 Mo. 273, Blair v. Smith.
30 Mo. 99, Shaw v. Nicholay.
38 Mo. 361, Warfield v. Lindell.
44 Mo. 596, Nelson v. Brodbak.
47 Mo. 282, Wall v. Shindler.
51 Mo. 335, Bank v. Evans.
52 Mo. 559, Shepley v. Cowen.
56 Mo. 177, Barry v. Otto.

59 Mo. 444, Ridgeway v. Holliday.
53 Mo. 305, Bledsoe v. Simms.
54 Mo. 105, Dalton v. Bank.
63 Mo. 233, Hamilton v. Boggess.
76 Mo. 454, Hill v. Bailey.

The statute of limitation will not run against the legal title prior to its emanation from the United States, but by the local law of Missouri it does run against an equitable title after it has emanated and bars recovery upon it.

13 Wall. 102.

By the same local law it vests the equitable title from which it bars the power of recovery in the adverse possessor.

But in this case it is immaterial whether the statute passes title or not.

EIGHTH. THE RECORD OF THE SUIT IN EQUITY BY CLAY COMMENCED OCTOBER 29, 1829, AND DECREE THEREON VESTED IN CLAY ALL THE EQUITY OF WILT AND HERTZOG.

No objection has been made that this record is not sufficient in substance and form to transfer to Clay the equities of the defendants therein. But it has been supposed the record had no effect; because none of the defendants had any interest in the land at or prior to that proceeding. It has not been denied that the persons named as defendants in the bill of Clay were the heirs of Wilt; because Samuel McRee under whom defendant derives title avers in his bill filed March 23, 1844, they were. The competency and sufficiency of the decree in favor of Clay to vest in him such equitable title as the defendants to the bill held, was never denied. The objection to Clay's decree was that the defendants *had no title* of any sort. The Supreme Court of Missouri held that no title of any sort vested in Christian Wilt until August 10, 1841; that the equitable title did not exist at the time of Clay's decree, nor until August 10, 1841,

and therefore the decree in favor of Clay was void (39 Mo. 565), and the sheriff's deed to Clay, the deed of Clay to the heirs of Wm. McRee and the deed of said William's heirs to Samuel McRee, and the deed of Samuel McRee to Pierre Chouteau were all void for the one same reason: that when the survey was returned to the recorder August 10, 1841, the equitable title vested in Wilt, and by one great bound according to the law of the United States so the court held, leaped from Wilt into Samuel McRee, who who held by a quitclaim deed just as Clay and Wm. McRee's heirs held.

NINTH. THE BILL OF SAMUEL MCREE FILED MARCH 23, 1844, SHOWS AN EQUITABLE TITLE IN HIM WHEN HE CONVEYED TO PIERRE CHOUTEAU.

This bill contains a full and accurate statement of facts connected with the case, all occurring prior to the return of survey 2498 to the recorder. The fact of the return of the survey August 10, 1841, is not mentioned in it. Samuel McRee averred in his bill, that these facts vested in him an equitable title. The court decreed that they did vest in him an equitable title. Certainly the court by its decree only declared the effect of the facts set forth in the bill. The court had no title in itself to pass to Samuel McRee. But its decree is the highest evidence that the equitable title had vested in Samuel McRee by means of the facts stated by him, and at the time they occurred and long prior to August 18, 1841. This decree is binding on Samuel McRee and the defendant who claims under him, and to estop him from denying that the equities of Wilt, Hertzog, Clay, and the heirs of William McRee were vested in him at and prior to his conveyance to Pierre Chouteau provided such equity had emanated from the United States.

TENTH. STARE DECISES.

This Supreme Court decided in Holme v. Fenn. 21, How. p, 481, that the survey 2498, vested an equitable title in the locator prior to its return to the recorder.

In the ejectment suit of Gibson v. Chouteau's heirs, 13 Wallace, p. 101 and 2, this court virtually decided that under the New Madrid act "the equitable title vested in the location prior to the return of the survey to the recorder. In that case the heirs of Chouteau were insisting that an equitable title did exist prior to the return of the survey and that it had vested in them by lapse of time. The court conceded that such an equitable title existed; but denied that Chouteau's heirs had set up in their answer such equitable title. The language of the court was this:

"The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected."

ELEVENTH. THE PLAINTIFF'S HOLD THE LAND BY RESULTING TRUST.

The patent to Mary McRee was issued to her in consideration that she was the real owner of O'Carrol's right. This is stated on the face of the patent. The language is as follows: The United States "grants to Mary McRee, assignee of Jas. Y. O'Carrol, in virtue of deraignment of title, the tract of land described in survey 2498."

The intention of the government shown on the face of the patent, which Mary McRee is estopped from denying, was to issue the patent to the person who had the claim which O'Carrol held against the government and to no one else. Mary McRee by personating the representative of O'Carrol, that is, claiming to be such representative

when she was not, obtained this patent. It will enure, therefore, to Chouteau as the true representative of O'Carrol in respect to the 64 acres; provided the plaintiffs are right in their position that under the law of the United States Samuel McRee had and conveyed an inchoate equitable right to Chouteau.

Mrs. McRee was fully aware that, unless she could place before the land department at Washington something to show that she was the owner of the O'Carrol claim, she could not obtain the patent. She proceeded consequently to procure deeds from several persons who had no interest in the O'Carrol claim and laid them before the commissioner of the general land office, and thus induced him to issue the patent to her as having the O'Carrol title when she had no interest in it at all so far as the 64 acres were concerned. She said she had the O'Carrol title and thereby got the patent, when Chouteau, in fact, had the O'Carrol title and ought to have had the patent. The most common case of resulting trust is that of A. using the money of B. to purchase and take a conveyance in his own name.

But in this case Mary McRee used the land warrant that belonged to Chouteau to get a patent in her own name.

The principle is the same. The consideration of the patent to Mary McRee moved from Chouteau and not from her; therefore, a trust results to Chouteau and his heirs for this land. In point of fact, at the time the patent issued to Mary McRee, she had no other or greater right, title, interest or claim in the land than Samuel McRee had after he conveyed the 64 acres to Chouteau. In 1838–9, when Samuel McRee conveyed to Chouteau the land located by certificate No. 150, he had a claim derived from and through O'Carrol, Ruddle, Gillespie, Tanner, Wilt, Hertzog, Clay, William McRee and William McRee's heirs to this land. Of this claim he conveyed 64 acres to Chouteau. He then died, without ever getting any other claim, devised the residue of his property to Mary McRee. She got some more deeds, but no more title than her husband gave her by his will, and

when she got the patent, she claimed to own the 64 acres her husband had sold to Chouteau, and on that very *claim* got the patent. This was getting a patent for her own use by means of Chouteau's right.

1 Peters, 193, Comegys v. Vasse.
30 Cal. 306, Salmon v. Symonds.
31 Cal. 420, Wilson v. Castro.
26 Cal. 124, Euiene v. Penman.
21 Cal. 222, Clark v. Lockwood.

We have shown that by the whole judicial history of the United States a person proceeding to purchase land from the United States, has an interest in the land as soon as the application is made for the land—and the applicant can sell and convey his interest. Now it is true that the Supreme Court of Missouri did decide that the deed of McRee to Chouteau was inoperative to pass title to Chouteau, because there was no equitable title in McRee at that time.

39 Mo. 565, Gibson v. Chouteau.

That the sale to Clay passed no title, for the same reason, that there was no equity in Hertzog, that is, the deed of McRee to Chouteau vested no right because the grantor had no right to pass. The Supreme Court of Missouri did not decide that the deed of McRee was not in due form to pass a title to Chouteau, had there been any to convey.

We show that in Holme v. Fenn, 21 How. 481, the Supreme Court of the United States decided that the certificate, notice of location and survey, without return into the recorder's office, was an equitable title, and though it would not maintain an action of ejectment, an equity was vested by the law. This decision shows that there is no reason for putting a different construction upon Bagnall v. Broderick, and the Supreme Court of the United States hold the same as all State courts hold in regard to our incipient land titles.

TWELFTH. MARY MCREE HAD NO NEW TITLE.

We know that Mrs. McRee says she got a new title by means of deeds from the heirs of Geo. Ruddle to Gibson, Nov. 28, 1856. But this record shows they had no title; Geo. Ruddle having long before conveyed away all his title to Tanner and Gillispie.

She claims to have obtained some new interest from the heirs of Geo. Dameron; but Geo. Dameron never had any interest in the O'Carrol confirmation.

See 35 Mo. 293, Holme v. Strautman, where the deed to Dameron was held void.

Mrs. McRee got a deed from John Ruddle's heirs, but he was a man of straw without any show of interest in the tract, so far as the record goes.

If Mrs. McRee claims anything under the deed of George Ruddle to Wm. Rogers, the plain answer to that is, that it is worthless. The deed of Ruddle to Rogers is dated February 23, 1817, was never recorded in New Madrid County at all, and never recorded in St. Louis County till August 19, 1871. It was fraudulent and void by section 8 of the recording act, October 1, 1804, 1, T. Laws, page 47, as against Ruddle's deeds to Tanner and Gillespie and those claiming under them.

It is claimed that Samuel McRee got a new title by his chancery suit commenced in 1844 and terminated in 1848. This is a mistake. He never claimed to have any new title. His bill asserts that he had an unquestionable equitable title at the time of filing it, and it was true except as to the 64 acres which he had conveyed to Chouteau.

The title of McRee rested upon the following facts: that Tanner's title was perfect by regular conveyances from O'Carrol; that Wilt really never owned the land, but Hertzog did, he owning all the effects of the house of "Christian Wilt;" that Clay got judgment against Hertzog and purchased the land at sheriff's sale, then conveyed to Wm. Mc-

Ree's heirs who conveyed to Samuel McRee. These facts made Samuel McRee equitable owner of the land before he conveyed to Chouteau. The chancery suit of McRee only developed the legal effect of these facts.

That suit stands now as record proof of the said facts and no more. If what that record shows be true, the equitable title was in McRee long before his deed to Chouteau, subject to the effect of Hertzog's older deed to Wash.

There is nothing in McRee's bill which was not contained in Clay's except McRee's admission of the facts.

THIRTEENTH. AFTER THE CONVEYANCE TO CHOUTEAU SAMUEL MCREE WAS IN FIDUCIARY RELATION TO CHOUTEAU.

We hold it immaterial what title, or whether any, was obtained by Samuel McRee after his conveyance to Chouteau in or by that suit. He seems to have understood his relation to Chouteau as his vendee, and to have acted with the utmost good faith. He not only ratified the sale by Hertzog to Wash and Wash to Chouteau, but conveyed his own right to Chouteau. From the moment McRee sold to Chouteau the 64 acres of the claim he stood in *fiduciary relation* to Chouteau. Chouteau from that moment had the same right to prosecute the claim into a title in his own name that McRee had. If McRee had a right to carry forward the claim to patent in his own name to the exclusion of Chouteau, Chouteau had a right to prosecute the claim into patent in his name to the exclusion of McRee. Neither, however, had any such right. Neither ever claimed any such right.

The deed of McRee to Chouteau put both parties on the same footing. If they were not tenants in common, or joint tenants, they had a common and joint interest in the prosecution of the claim for the benefit of both. If either acted for himself the utmost good faith was required towards the other.

Two patents could not be issued. The practice of the land department was to issue one patent to the original

claimant (O'Carrol in this case) or his legal representatives.

One or the other must necessarily possess the common title papers and act for both.

27 Mo 451, Papin v. Massey.

Samuel McRee seems to have fairly filled this position. His interest was large, and though he recognized and ratified the antient possession of Chouteau and all his rights, he kept all the title papers, and prosecuted the claim for the benefit of himself and assignee, Chouteau. It was *located land* he had sold to Chouteau, and he took steps to have the claim located for himself and Chouteau.

If McRee intended to prosecute the claim for the benefit of Chouteau, the proceeding should be in the name of O'Carrol or his legal representatives. Accordingly we find that the patent certificate of August 10, 1841, the only title paper ever obtained by Samuel McRee, was in the name of James Y. O'Carrol or his legal representatives, leaving to Chouteau, as such representative, his interest according to the deed of McRee and the deed of Wash. Here was an admission that Samuel McRee did not claim the whole title in himself. On the 23d day of March, 1844, when Samuel McRee brought his suit in chancery, to perfect the title, he sued not wholly for himself, but for himself and his assigns, meaning Chouteau, for he never had any other assignee. On the 16th day of October, 1845, while his chancery suit was pending, he acknowledged in writing Chouteau's title to the land under him by a deed to James H. Lucas and Ann L. Hunt. This deed shows it was well understood between McRee and Chouteau that the land he was suing for was derived to him for the use of Chouteau and himself; the bill praying on its face that the decree should be for him and *his assigns*. Here was a direct and positive admission in writing of the trust.

Oral evidence is competent to make known or declare a trust which is also proved by writing.

We have the oral evidence in explicit declaration of the trust.

In 1847, Samuel McRee agreed with Charles P. Chouteau, acting for his father, that Cozzens should survey off the 64 acres to Chouteau and mark the corners of dividing lines with stones with his, McRee's, name upon them. Plats were made by McRee's direction and authority, separating Chouteau's lands from his and his from Chouteau's, which maps were delivered to McRee and accepted by him and his agents. This is a written acknowledgment by McRee's agent of Chouteau's title.

Here is another declaration of trust in favor of Chouteau for any claim obtained by McRee to Chouteau's land under the decree. When Samuel McRee filed his bill, in 1844, Chouteau was in possession of the 64 acres, yet he made no claim upon Chouteau — did not name him as defendant in the bill, because he had prayed a decree in his favor for him and his assigns. This is record evidence and written proof, and a written disclaimer that Chouteau's possession of the 64 acres was a wrongful possession. The evidence, oral and written, shows that Samuel McRee considered the land Chouteau's.

There is not in this record a particle of proof that Samuel McRee ever denied Chouteau's title, but every sort of proof that he admitted and ratified it.

That Samuel McRee lived lived ten years after his deed to Chouteau, in sight of Chouteau's possession, and eight years after the land was located by the United States as is contended by return into the recorder's office, but at no time made any claim, and continued to his death always to affirm the ownership of Chouteau, by acts, by words, by his deeds, by his bill, ought to be conclusive of the resulting trust in Chouteau's favor. Standing alone such facts would entitle Chouteau's heirs to a decree.

If this suit was pending against Samuel McRee, he being in life and holding the patent, the right to recover against

him would be clear, provided title vested in him before the return of the survey to the recorder.

FOURTEENTH. THE DEFENDANT GIBSON STANDS IN THE PLACE OF SAMUEL MCREE.

This brings us to consider what has transpired since the death of Samuel McRee.

(1.) Mary McRee took all his estate by his will, and such interest as he had in this land, and no more, all of which he did not sell to Chouteau.

(2.) She attempted to get title to Chouteau's land as follows: She procured an order annulling patent certificate No. 447, to James Y. O'Carroll and his legal representatives, and afterwards procured a patent to issue in terms contrary to the whole practice of the land department, in that the patent, instead of being issued to James Y. O'Carroll or legal representatives, was direct to Mary McRee.

27 Mo. 451, Papin v. Massey.

5 Mo. 147, Bryant *et al* v. Hickman.

It seems the commissioner of the general land office was not willing in this case to leave McRee to prove she owned the O'Carroll claim, but was induced to assume judicial functions and decide that she had the title herself. Thus the patent was issued to her for Chouteau's 64 acres. The defendant Gibson takes his title so obtained with full notice of its defects, if any.

Now on these facts we claim a decree vesting the 64 acres in Chouteau's heirs.

FIFTEENTH. THE DEFENDANT GIBSON WHO HAS NO TITLE BUT WHAT HE GETS FROM MARY MCREE, THROUGH SAMUEL MCREE, OBJECTS TO THIS VERY TITLE IN VARIOUS WAYS.

Mr. Gibson's objections: —

(1.) He says the deed by O'Carrol to Ruddle passed no title to Ruddle, because the land was not confirmed to Rud-

dle at the date of the deed. It is true the land was unconfirmed. But O'Carrol sold the land that *should be confirmed to him;* sold his contingent interest, his possibility, expectancy; and the deed operated on the land as soon as confirmed. The deed was with warranty and estopped and passed the confirmed title.

When one pending a claim for confirmation purchases the claim in whole or in part, he is entitled to the confirmation.

27 Mo. 445, Papin v. Massey.
12 Mo. 254, Landes v. Perkins.
10 How. , Landes v. Brant.

(2.) It is objected by Mr. Gibson that the deed of Andrew P. Gillespie to James Tanner, dated October 16, 1816, conveying all his interest in the O'Carrol claim, wants the word "*heirs*," and therefore passed only an estate for the life of Tanner.

There is nothing in this: —

1. Tanner is not dead by any evidence in this record.

2. Tanner and Gillespie being joint tenants, this deed of release passes the fee without the word "heirs."

3. The covenant of non-claim and warranty against all persons passes the fee. When one joint tenant conveys to another, no words of inheritance are necessary.

1 Washb. Real Prop. 558, 73.
4 Kent, 364.
17 Mo. 13, Rector v. Waugh.

A universal warranty against the claims of all persons passes a fee without words of grant.

21 N. H. 528, Brown v. Manter.
8 W. & Searg. 67 Defrance v. Brooks.
24 Cal. 171, Owen v. Frink.

(3.) No objection to any deed, commencing with that of O'Carroll to George Ruddle and ending with that of Wm.

McRee's heirs to Samuel McRee, can be made in this suit by Gibson. He claims under Samuel McRee, who has admitted and relied, in suit and in evidence, on all those deeds and every one of them. Samuel McRee averred the validity of Tanner's title and Wilt's and Hertzog's in his chancery suit. He finally sold and passed all these deeds to Chouteau as valid things and muniments or title, and neither he nor his assigns can dispute any of them. Tanner recites his good claim (chain) of title from O'Carrol and that binds his assignees.

30 Mo. 273, Warfield v. Lindell.
5 Wall. 795. Deery v. Croy.
8 Cowen, 586, Sinclair v. Jackson.
11 Paige, 289, Edwards v. Varrick.

The possession of Chouteau for thiry years claiming under these deeds, and all of them, creates a presumption of deeds executed by every claimant from O'Carrol to Clay.

5 Mo. 301, McNair v. Hunt.

(4.) But all these deeds are proper legal evidence under several statutes which provide for reading them in evidence when the possession has been held under them. The statutes are as follows: —

Statute of 1865.
1 Wagner stat. of 1872, p. 595, § 36; § 40, p. 596; §31 and 32, p. 594.

(5.) Mr. Gibson has assumed a bolder ground. He insists that George Ruddle had no right of location. That the certificate which issued in right of his purchase from O'Carroll was fraudulent and hence he supposed that he, Gibson, only can possess the land. There is no evidence of fraud, and if there was, Mr. Gibson cannot raise such an objection.

He claims under Samuel McRee, who could not question the sale by O'Carrol to Ruddle, nor the validity of certifi-

cate No. 150, and Gibson claims the land directly from Ruddle's heirs. He can neither deny the certificate, survey, or patent.

But there is another answer, if the certificate is void the land remains in the United States, provided it chooses to reclaim it. Mr. Gibson does not represent the United States, and cannot speak for it.

Fraud against the United States can only be complained of by the United States.

1 Mo. 261, Stewart v. Rector.
24 Mo. 37, Mitchel v. Parker.
25 Mo. 35, Lee v. Parker.

We have now shown what were the federal questions and what were the local or State law questions in this record. We will now show the rulings.

SIXTEENTH. WHAT THE STATE COURT DID AND DID NOT DECIDE.

Let us first see distinctly what the State court did not decide. It did not decide that a New Madrid certificate was not property; before as well as after its location. It did not decide that Christian Wilt was not the owner of certificate No. 150, and of the survey 2498, by a regular chain of conveyances from O'Carroll, George Ruddle, Tanner, and Gillespie; nor that *Christian Wilt* was not the name of a partnership firm composed of Christian Wilt and Joseph Hertzog; nor that Hertzog did not own all its property and effects, including said certificate No. 150, nor that it was not liable to sale under execution for the payment of the debts of said firm and the individual debts of Hertzog as well; or that the judgment in favor of Clay against Hertzog, or the execution thereon, or the levy, sale, or conveyance to Clay by sheriff or sheriff's deed was not legal and regular and competent to pass to Clay by the State laws the title of Wilt and Hertzog in the land *if there was*

any title vested in them. Nor was it ever decided by the State court that the record of the suit in chancery by Clay against the heirs of Wilt, and Hertzog, and Wash, was not in all respects regular and proper to confirm in Clay as against the defendants therein the title to the land, *provided said defendants had title*, or that the deed by Clay to Wm. McRee's heirs, or the deed by William McRee's heirs to Samuel McRee, or by Samuel McRee to Chouteau was not in due form and couched in fit and proper terms to *pass all title held by the grantors* to the respective grantees *if the grantors had title.* The State court did not decide that a quitclaim-deed would not transfer an expectancy, *provided such expectancy existed*; nor that Pierre Chouteau did not hold the land by resulting trust, *provided said Chouteau acquired an equity* from Samuel McRee. The State court never decided that Mary McRee procured any other title than Samuel McReee had, *provided an equity vested in him* prior to the return of the survey. The State Court did not decide that Samuel McRee was not in fiduciary relation with Pierre Chouteau *provided an equity vested in him* prior to the return of the survey. The State court never decided that Gibson was an innocent purchaser from Mary McRee, nor that the covenant of Tanner did not run with and bind the land in the hands of his assignee, *if Tanner had an interest in the land.* We say emphatically the State court made no decision in this cause that was not based upon the one fundamental error — namely, that *no inchoate equitable right or title in the land existed prior to the return of the survey.*

Whatever question came up either of federal or local law was settled by the universal answer viz: *there was no interest in any one prior to the return of the survey.*

Even the pretended *res judicata* is based upon nothing else. The Supreme Court of Missouri decides that the plaintiff's equities were in issue in the ejectment suit. The Supreme Court of the United States decided the equities were not in issue. The Supreme Court of Missouri on the

case coming back to it held they were in issue and entered its judgment of recovery in ejectment.

Then declared its judgment final—: res judicata. The plaintiffs commenced this suit and the Supreme Court so delivered its opinion that it had already made the matter of the petition *res judicata* by disobeying the Supreme Court of the United States. This is the *res judicata.*

The State Court further decided that under the laws of the United States the return of the survey into the recorder's office, was another and different title than that which was the subject of the conveyances by Hertzog, Clay, Wm. McRee's heirs and Samuel McRee; *was an after acquired title*, but we say there was no *new* after acquired title. There never was but one title in the contemplation of the contracting parties; or the act of congress, viz: the title defined by the act of congress, as to be consummated by patent and which all understood.

We know the State Court decided that the conveyance by Wash to Chouteau was void; we accept that decision and do not rely upon the deed. But that decision was quite immaterial to the merits of the cause, because the court had already decided that all deeds prior to the return of the survey were void because the grantors had nothing under the laws of the United States to convey.

An after acquired title in the language of conveyances is a new title. But this was no new title.

In the same case the court says, 39 Mo. R. p. 565, "But afterwards in 1844, after the complete location had been made and the equitable right had become vested beyond any question in the heir of Wilt, a bill in chancery was filed by Samuel McRee against the heirs and representatives of Wilt and Hertzog, praying that all their right and title to the located land might be vested by decree in the plaintiff and such decree was accordingly made. Samuel McRee thereby became the owner of the inchoate equitable title to the located land as the legal representative of O'Carrol and

by his will the same was passed to Mary McRee his widow in 1849."

If this be so, we fail to see how Samuel McRee obtained his equity unless it was vested in Wilt by the laws of United States previous to the return of the survey. The conveyance to Clay by sheriff was a quit-claim and passed nothing unless the act of Congress had vested a right in Hertzog prior to the sheriff's deed.

The decree of court could only declare the effect of existing facts. If there was no title in Wilt or Hertzog at the date of the sheriff's deed, the court could not create one. No. The record of the suit in chancery by McRee is conclusive that prior to the return of the survey into the recorder's office, a title had vested under the act of Congress in Wilt, Hertzog, Clay, William McRee's heirs and Samuel McRee; and this was the theory of McRee's suit, because the return of the survey is not mentioned in it. The bill avers that the equitable title was vested in him by means of the conveyances set forth beginning with Wilt and ending with the heirs of William McRee; either the title decreed to Samuel McRee was vested in the persons under whom he claimed, and obtained from them prior to August 10, 1841, *or it was created for him by the omnipotent power of the court*; but the decision of the State court that Samuel McRee took his title from Wilt after the return of the survey, is merely a repetition of its error. What we have now said is deemed sufficient to show that the State courts disposed of the cause of Gibson v. Chouteau's heirs, 39 Mo. R. p. 536, by ruling that the laws of the United States created no right to the land in controversy in favor of any party prior to the return of the survey, and but for this error the plaintiff would have recovered the land.

We know the Supreme Court of Missouri held that the decree in favor of Hertzog was void, because the heir of Christian Wilt was not a party. We do not rely upon the Hertzog decree. Its effect was immaterial. The court had already held neither Wilt nor Hertzog had any title, be-

cause none had emanated from the government. This is shown by its treatment of Clay's deed and Clay's decree. Confronted with these the State court could not deny their effect to pass title under the State laws, but set them aside because no title had emanated from the United States. But for this error no decision could have been made against the plaintiffs on any local question.

SEVENTEENTH. THE JUDGMENT OF THE STATE SUPREME COURT IN THIS CAUSE.

The only point of this last decision is a statement in the *opinion* of the court that the judgment of the Supreme Court of Missouri (39 Mo. p. 536), is a bar to this suit. A majority of the Supreme Court of Missouri consisting of five judges, disposed of the cause by the following opinion:

"We concur in affirming the judgment in this case, on the ground that the matters now in issue have heretofore been passed upon by this court in another suit between the same parties, and have, therefore, passed *in rem judicatam*.

Warwick Hough,
John W. Henry,
Robert D. Ray.

But for the reason named the plaintiffs must have recovered the land. It cannot be claimed by the defendant that the State court placed its opinion on any ground of State law, save that of *res judicata*, nor on any *res judicata* except a declaration in 50 Mo. p. 85, that its judgment rendered in defiance of the opinion of this court should end the controversy; to accomplish which the Supreme Court expressed its opinion that its judgment was *res judicata* as to any future suit of plaintiffs. The State court had no jurisdiction to decide a cause not yet before it. Its opinion so far in advance of the question, is no bar to the present suit. The Supreme Court of Missouri had no jurisdiction to reverse the *ruling of* this court.

EIGHTEENTH. THERE IS NO QUESTION OF RES JUDICATA IN THIS RECORD.

The jurisdiction in respect to the judgment of a State court has always been held to depend on the presence or absence of certain matter in the record. It cannot be made out by mere assertion or assumption.

Before this court can undertake to review the judgment of a State court, it must find and point out in the record the question raised by pleading and decided by the State court to which its jurisdiction extends. If it cannot do this, it has no jurisdiction. When the State court undertakes to oust the jurisdiction of this court to review its action on a question of federal law, the same principle applies.

It must appear that the local question was really in the record, or the jurisdiction of this court will not be defeated It cannot decide a federal question erroneously and call it a local question. We mean to say that if the plaintiff sues in ejectment to recover possession of a tract of land which the record shows he claims by virtue of a Spanish confirmation, and the defendant claims the same land by a patent of the United States: a finding by the State court that the plaintiff had conveyed the land in suit to the defendant prior to the action, there being no such question in the record, would not defeat the jurisdiction of this court unless this is so; the jurisdiction of this court is dependent entirely upon the arbitrary will of the State court.

If in this cause the State court had decided that the matter of plaintiff's petition is *res judicata*, it has done so contrary to the fact and without such question being in the record.

There is in defendant's answer a statement substantially *that in his opinion* the matter of this suit was adjudged in Gibson v. Chouteau's heirs, 39 Mo. 536. But it is not a plea of *res judicata*.

It does not set forth the pleadings in the former suit, nor contain a single averment of fact which is not a mere opinion of the pleader.

Under the State code of practice facts must be stated; facts showing that the cause of action presented in this suit was *litigated and adjudicated* in the former suit.

Instead of that we have in this *so called plea of res judicata* a statement that in the ejectment suit the plaintiffs put in issue, set up and had the benefit of the same claim to the equitable relief or title they set up in this petition; and every document and point and argument under which they claim in this case were pleaded and set up and claimed by them and involved and determined in that case, and the defendant relies on the judgment so rendered in that case as a bar to plaintiffs' claim to the equitable right set up in this case.

How did the plaintiffs put in issue their equitable claim in the former suit? Was it pleaded in bar of the action or how? Or was something said in the ejectment suit by one party about said equitable claim, and denied by the other party? What is meant by the plaintiffs *here having the benefit of their claim*? Suppose all the documents and points and arguments were pleaded. How were they pleaded? Was it orally at the bar or in the answer by matter of record and was it in bar or was it on a motion for continance, or for new trial or how? It is said they were involved and determined in that ejectment suit. But how involved and how determined? Did the court rule them all out as not within the issues or admit them and adjudge their merits? What disposition did the judgment make if any in respect to these pleas, documents, points and arguments?

This plea of *res judicata so-called* gives no answer. It does state that Mr. Gibson relies on it as a bar to the plaintiffs' petition; but why he relies on it is not shown. It does not say that the merits of the plaintiffs' equity were litigated and adjudged against them in the ejectment suit. The supposed plea of *res judicata* is consistent with the

fact that the plaintiffs equitable claim was much talked about but really never in issue in the ejectment suit and never adjudicated. The fact is the Supreme Court of Missouri did consider the plaintiffs equities in issue in the ejectment suit. But Mr. Gibson insisted in this court they were not in issue. This court decided they were not in issue at all, and could not be adjudicated; and remanded the cause for proceedings in conformity with its opinion. Thereupon the Supreme Court of Missouri reaffirmed its opinion that the equitable claim was in issue rendered a judgment of ejectment against the plaintiffs and then and there proclaimed its judgment *res judicata* to forestal the present suit based on the opinion of this Supreme Court.

That is the so-called *res judicata!* Let us concede the pleading is sufficient and sets forth the issues raised by the pleadings in the ejectment suit, what is the effect of the record pleaded? which is to declare the effect of the record? the opinion of this court that the equities were not in issue, or the opinion of the Supreme Court of Missouri that they were in issue? To which tribunal does the jurisdiction belong?

Let us look at the record of Gibson v. Chouteau's heirs and see what were the issues there made and tried and what the judgment. We shall then see why the supposed *res judicata* was stated as it was. Gibson v. Chouteau was an action of ejectment.

In his petition Mr. Gibson stated, (Rec. p. 113): —

That August 10, 1862, defendant Chouteau was in possession of the land (describing it); that prior thereto Mary McRee was invested by the United States with the title, and so being conveyed to plaintiff, who being entitled to possession of said premises, defendant unlawfully entered thereon and unlawfully withholds the possession thereof from plaiutiff to his damage $3,000. That the monthly rents were $70. Therefore plaintiff prays judgment for possesssion and damages and monthly rents.

JAMES R. LACKLAND & JOHN FLOURNOY,
Attorneys for plaintiff.

The answer of Pierre Chouteau was to the following effect, (Rec. p. 116). He denied unlawfully withholding possession, or entering into possession and denied plaintiff 's right to possession, denied that Mrs. McRee was invested with title, stated he had no knowledge or information that Mary McRee conveyed to plaintiff, nor of the deeds under which plaintiff *claimed title if any*, averred he had held adverse possession for more than forty years. He said "that the right title and interest which plaintiff claims to have, and all and every deed he may produce in support of such title or claim *if any* * * *" was acquired and obtained by plaintiff as agent and attorney for defendant and for the use of and in trust for defendant * * *" and was fraudulently and wrongfully made to plaintiff by his procurement in violation of the rights of defendant instead of to defendant as they should have been. And defendant denied any right or title in plaintiff, and denied plaintiff could maintain this suit and be allowed to use such deeds in evidence in support of his pretended title to the premises.

HILL & BURWELL,
Attorney for defendants.

The verdict was as follows (Rec. p. 125): The court being now fully advised finds the issues herein for the plaintiff and doth assess his damages at the sum of six hundred dollars, and the monthly value of the rents and profits * * * at $50.

THE JUDGMENT (p. 125) was this: "It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the *possesion* "of the premises," etc. It is seen at once the matters set forth in this suit *were not adjudicated* in Gibson v. Chouteau's heirs, 39 Mo. 536. Both suits related to the same land; but that was an action at law, this a petition in equity. In the former the issues raised were in respect to the legal title to the land. In the present action the issues raised are in respect to the equitable title.

In the former suit the plaintiff prayed judgment only for possession and damages. In this suit the plaintiffs pray that the titles of the defendant here, plaintiff in the former suit, be decreed to them. The plaintiffs in this suit assert nothing in conflict with the averments of the plaintiff in the former suit.

The plaintiffs here deny nothing which the plaintiff in the former suit averred. The plaintiffs in this suit concede and admit everything found by the verdict in the former suit, and everything awarded to the plaintiff therein. There is not a fact found by the verdict in the former suit which the petition in this suit denies; there is nothing in the judgment in the former suit that the plaintiff in this case questions. How then were the issues in this suit adjudicated in the former suit? There were no such issues in the former suit.

As to the law of *res judicata* we respectfully refer to the argument of Judge Gantt, attorney for Mr. Maffitt, to the force of which we can add nothing.

That the answer of Pierre Chouteau was not intended to embrace an equitable defence is manifest by §13, p. 1233, 2 R. S. 1855 of Missouri, viz: The defendant may set forth by answer as many defences and counter-claims as he may have whether they be such as have been heretofore denominated legal or equitable, or both. They *must* be separately stated in *such manner* that they may be intelligibly distinguished and refer to the causes of action which they are intended to answer.

The answer of Chouteau to the ejectment suit sets forth only one defense.

There is no *separation* of the matter of the answer which the the code requires in case of two or more defenses. Bliss on Code Pl., § 346, says: It is sufficient when the statement of one defense is complete to begin a second defense in this way, "and for a further and additional defense," or "for a further and second defense," etc. This answer contains but one defense, and that must be either a

legal or *equitable* defense. Which is it? Certainly the denials constitute a defense at law; therefore, no other was intended.

The verdict in the ejectment suit finds nothing about an equitable defense. The judgment of the Land Court in the ejectment suit passed on no equitable defense.

It will be seen that on the trial of this cause in the Circuit Court the supposed plea of *res judicata* was not found to be true. *There was no finding of any verdict or any fact.*

The whole action of the Circuit Court is contained in the following order:

"It is thereupon ordered, adjudged and decreed that the said petition or bill of complaint of said plaintiffs be dismissed, and that the defendant recover of said plaintiffs his costs and charges herein expended, and have execution therefor."

Record, p. 35.

If we consult the record proper consisting of the pleadings, verdict and judgment of the State courts, we find absolutely nothing to show that the State court decided the plaintiff's petition was *res judicata*.

It is necessary to consider here the State Code of practice.

"The plaintiff's petition must contain a plain, concise statement of the facts constituting a cause of action without unnecessary repetition."

2 Rev. Stat. of Mo. 1855, p. 1229, § 3.

"The answer shall contain (1.) A specific denial of every material allegation of the petition controverted by defendant, or of any knowledge thereof sufficient to form a belief. (2.) A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."

Same book, p. 1232.

"A trial is the judicial determination of the issues between the parties whether they be issues of law or facts."

Same book, p. 1261 and 1263.

"§ 20. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally on all or any of the issues either in favor of plaintiff or defendant. A special verdict is that by which the jury finds the facts, only leaving the judgment to *the court*."

Same vol. p. 1278.

"§ 1. A judgment is the final determination of the right of the parties in the action."

"§ 2. Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and may determine the ultimate rights of the parties on each side as between themselves and may grant to the defendant any affirmative relief to which he may be entitled."

Same book, 1301.

"§ 35. The Supreme Court in appeals on writs of error shall examine the record and award a new trial reverse or affirm the judgment or decision of the Circuit Court or give such judgment as such court ought to have given as to them shall seem agreeable to law. When the facts in a special verdict are insufficiently found they may remand the cause and order another trial to ascertain the facts."

The code applies to all suits of law or equity and all courts.

The Supreme Court is subject to the same law. If it would give such judgment as the inferior court ought to have given, it must proceed upon a finding of issues. It may adopt the finding of the court below or enter its own verdict and judgment. In this case no verdict was found by the Circuit Court. How was it possible to find that the allegations of the defendant Gibson called *res judicata* were

true? The court could not find more than the existence of the record and the record shows not one of them was true. The defendant, Pierre Chouteau, did not in his answer set up in said suit, nor put in issue, nor have the benefit of the claim of equity which is presented in this suit. Not a document mentioned in this suit was pleaded in that. Not a point or argument made in this case was in the answer in that. The verdict and judgment in that case are silent touching any issue of equity raised in this case.

If the Supreme Court had found every line and word of Mr. Gibson's answer in this case to be trne it is not *res judicata*.

But the Supreme Court found no verdict.

The court of appeals simply affirmed the judgment of the Circuit Court, but entered no finding of any issue.

The Supreme Court affirmed the judgment of the court of appeals, but entered no verdict, found no issue. There is no uncertainty about the record, and the opinion of the State court need not be looked at. If however, this court finds it proper to look at opinions it will appear that the court of appeals did not find for the defendant on his so-called plea of *res judicata*, but totally denied and rejected it. It said Gibson's action of ejectment was a purely possessory action. The answer to it did not set forth any specific claim or equitable defence arising out of the facts stated in this suit; and in fact the equitable right of Chouteau's heirs was not concluded by the judgment. The opinion of the court of appeals stated that inasmuch as the Supreme Court of Missouri had decided (39 Mo. 536) that at the date of Samuel McRee's conveyance to Pierre Chouteau no right or title had vested in the grantor, and as this opinion was binding in law on the court of appeals, however unanawerable the opposing view, it must decide the cause against plaintiffs, and did so *on that ground*. Now if this opinion of the court of appeals was and is a part of its judgment there was no *res judicata* in it but simply a decision that no title passed out of the United States prior to August 16, 1841. Its

judgment was nothing more than a reiteration of the legal opinion of the Supreme Court of Missouri (39 Mo. 536). The Supreme Court only affirmed the judgment of the Court of Appeals. The record of the Supreme Court of Missouri in this cause is clear and positive that no verdict was rendered on any issue. But even the opinion of the Supreme Court of Missouri in this cause is not sufficient. The court says "While the answer of defendants (in Gibson v. Chouteau's heirs, 39 Mo. 536), in setting up their defense might have been excepted to because of the generality of its averments and have been required to make it more specific; the most that can be said of it is, that it stated a defense defectively. We have repeatedly held that a judgment rendered on a petition which states a cause of action defectively is good after verdict." We admit that. We admit also the rule applies to an answer setting forth a defense defectively. But we insist there must be a *verdict* finding the cause of action or defense. There must be certainty somewhere. Here is nothing of the sort. The answer shows no equity in any form, fails even to use the word, or to aver any interest in defendant and contains no prayer for equitable relief. Now if the verdict had negatived in any way the equity, or if the judgment had passed upon the question of equity there would be some ground to say the equity had been defectively set forth; but the court considered it, and it had passed in *rem judicatam*. But can it be said an issue was tried under such a code of practice, when there was no verdict returned about it? Can it be said to have passed into judgment when no judgment can be found that covers it or even alludes to it?

The Supreme Court of Missouri says "a party ought not when his whole defense is actually tried and he has had the benefit of it as if pleaded, *and judgment has been rendered against his defense* be heard to complain that the pleading was not sufficiently specific."

All this is reasonable and just when based on facts. In this case the facts are wanting.

The equitable title of plaintiffs now presented was not even defectively set forth in Gibson v. Chouteau's heirs. There was no verdict in respect to it. The plaintiffs have not had the benefit of it as if pleaded. If pleaded the plaintiffs could have brought their cause into this court and had its judgment on their claim of equitable title. This court by its opinion in the ejectment suit struck out of that record all pretense of an equitable defense, deprived plaintiff of every benefit of such a defense. When the case of Gibson v. Chouteau's heirs was remanded to the Supreme Court of Missouri these plaintiffs stood before that court as defendants in a mere action of ejectment, stripped of every claim to an equitable defense, they having no right to ask the court to consider their equity, and the court having no power to do so if asked.

In the Missouri Code of practice there are no general issues. The *special* facts must be stated (2 R. S. 1855, p. 1232, §12). Under this code oral evidence can never be allowed to show what was in issue and what was tried. The pleading must show the issues. In case of insufficient pleadings and a trial of an issue not shown by them the court directs *the facts to be found* so as to fit the evidence, and the pleadings to be amended accordingly (2 Rev. Stats. 1855, p. 1253, § 2). So that the verdict and judgment must show what a defective pleading fails to show. If the answer of Chouteau in the ejectment suit was more verbose than Chitty required, that did not make it an equitable defense. To set forth an equitable defense Mr. Chouteau should have inserted in his answer the averments of a bill in equity with all details of dates, names, deeds, documents, and their contents and exhibited them such as they now appear in the plaintiff's petition in this suit.

It cannot be claimed that the negative averments of the answer constitute an equitable defense. Can the affirmative averments make out an equitable defense? Do these affirmative averments contain the elements of a bill in equity? What are they? Their whole substance may be stated thus:

The deeds of Gibson, *if he has any*, were procured by him as agent of and in trust for defendant, and should have been made to defendant instead of to Gibson. We maintain that this is neither an equitable or legal defense. An answer setting up an equitable defense is in the nature of a bill in equity, and must contain its essential averments.

20 Mo. 429, Magwire v. Vice.
19 Cal. 248, Estrada v. Murphy.
34 Wis. 486, Lombard v. Cochran.
24 Cal. 114, Downer v. Smith.

Unless the defendant sets forth his equity with the same particularity as in a bill in equity, he must be regarded as relying on a legal title.

47 Cal. 146, Miller v. Fulton.
29 Ind. 380, Conger v. Parker.
60 Barb. 216, Cramer v. Burton.
42 Cal. 346, Bruck v. Tucker.
4 Lansing, 335, Hicks v. Shepherd.
41 Cal. 325, Kenyon v. Quinn.
37 N. Y. 309, Bates v. Rosecrans.

Defenses purely such, that is, such as defeat the plaintiff by showing his want of title to recover, must be pleaded.

But a defense which consists of a cross action against the plaintiff, and which defeats the plaintiff by first establishing a claim against him, need not be pleaded, and may be prosecuted in another action.

Pomeroy's Remedies, § 804.

There is no provision in the Missouri Code of Pleading which requires a defendant to set up a counter-claim in defense to an action.

Freeman Judgments, 3rd ed., § 277.
13 Wend. 277, Cook v. Moseby.
17 Mass. 237, Minor v. Walton.
4 Brewster, 98, Kauf v. Mesner.

46 Vt. 200, Davenport v. Hubbard.
42 Barb. 37, McDonald v. Christie.
31 Ala. 163, Robbins v. Harrison.
43 Barb. 628, Barth v. Burt.
6 Cal. 452, Loraine v. Long.
23 Cal. 596, Hobbs v. Duff.
45 Cal. 128, McCrary v. Casey.
30 Cal. 309, Hough v. Waters.

The same doctrine prevails in Missouri.
46 Mo. R. 26, Weight v. Salsbury.
49 Mo. 570, Gordon v. Bruner.

Whether the affirmative matter in Pierre Chouteau's answer to Gibson's ejectment, presented the substance of a bill in equity against Gibson will appear by Story Eq. Pl. § 27, where it is said: "The third part (of the bill) is the premises, or as it is more usually styled the stating part of the bill which contains a narrative of the facts and circumstances of the plaintiffs' case and of the wrong or grievances of which he complains, the names of persons by whom done, and against whom he seeks relief. This part constituting in part the bill upon which the court is called to act, requires great skill and judgment to frame it aright; and if it has not the proper legal certainty the defect, unless removed, may become fatal in every stage of the cause."

§ 257. Story Eq. Pl. "Every fact essential to the plaintiffs' title to maintain the bill, and the relief must be stated in the bill, otherwise the defect will be fatal. *No facts are properly in issue unless charged in the bill.* Of course no proof can be offered of facts not in the bill."

§ 852. Story Eq. Pl. An answer must be full and perfect to all the material allegations in the bill. * * It must state facts not arguments." This is equity pleading. It is certain the answer of Pierre Chouteau in the ejectment did not attempt to set forth an equitable defense.

And so this court ruled in 13 Wallace, 92, deciding of this very answer that "When a party by his pleadings set forth a merely legal title he can not on the trial be let into proof of facts which show that having an equity he is entitled to a conveyance of the title." Now what matters it, that the State Court held that the answer contained an equitable defense when this Supreme Court held the contrary and made it impossible for these defendants to appeal on that record to this court?

By that decision of this court the present plaintiffs lost all benefit of their equitable claim in the ejectment suit.

NINETEENTH. THE JURISDICTION OF THIS COURT HAS NOT BEEN OUSTED BY THE JUDGMENTS OR OPINIONS OF THE STATE COURT.

We concede that the jurisdiction of this court extends only to federal questions but as to them it is final. We concede the jurisdiction of the State court is exclusive and final in respect to local questions.

This court being paramount in its own sphere of jurisdiction, must of necessity maintain its own and resist encroachments upon it.

§ 709, Rev. Stat. United States, 1878, p. 133, declares that this court has jurisdiction to re-examine, reverse or affirm a final judgmment of the highest court of a State where a right is claimed under the constitution or any treaty or statute, or commission held, or authority exercised under the United States, and the decision is against the right claimed.

Incidental to this jurisdiction and a part of it is the right to decide when the question arises to which the jurisdiction of the court extends. If this court has no power to decide for itself and to decide finally, when the question arises it cannot exercise its jurisdiction at all, and cannot discharge its constitutional duty. The right to decide when the jurisdictional quesfion arises and what it is, is the right to

determine the meaning and effect of pleadings which come here in the records of the State Courts. If the State Court has an exclusive jurisdiction to decide for this court what is the effect of pleadings and when federal questions arise; when they do not; and what they are; it can determine the jurisdiction of this court and define and limit its revising power over the judgment of the State Court. We deny that the State Court has such jurisdiction. But it has claimed it in this case, and so far has maintained it.

In the case of Gibson v. Chouteau's heirs, 39, Mo. 536, the Supreme Court of Missouri had before it the question whether the laws of the United States and legal acts done under them, created a title or interest in Samuel McRee, the owner of a New Madrid location and survey, prior to the return of the survey to the recorder. This was a federal question and the plaintiffs had a right to the judgment of this Supreme Court on that question. Mr. Gibson insisted the pleadings in the cause did not raise the question. The Supreme Court of Missouri held the pleading did raise it, and decided it against these plaintiffs. The case came here and the court decided the pleadings did not raise the question and so plaintiffs could not obtain the decision of this court on the federal question. The plaintiffs lost their cause in the State Court because that court decided the federal question against them erroneously. They have not been permitted till now to get the judgment of this court on the question, because this court decided the question was not raised by the pleadings and could not be adjudicated on that record. Thus the question of *pleading* was made the question of *right*. But if the question of pleading was made the question of a right, under the laws of the United States, this court must have jurisdiction of the question of pleading.

The constitutional right of the plaintiffs to the judgment of this court on a federal question cannot be prevented by any act of the State Court.

But an attempt has been made in this case to defeat plaintiff's right to such judgment.

After this court decided 13 Wall. Gibson v. Chouteau's heirs, at the instance of Mr. Gibson, that plaintiffs' equitable title was not embraced by the pleadings and could not be adjudicated on that record, and the cause was remanded, Mr. Gibson again appeared before the Supreme Court of Missouri, insisted that the equitable title was embraced by the pleadings, and induced that court not only to render a judgment of ejectment against the defendants, but to declare its judgment *res judicata* as to any future suit of the plaintiffs.

If the action of the Supreme Court of Missouri had been recorded thus: The Supreme Court of Missouri claims the exclusive and final jurisdiction to decide when a federal question arises on the pleadings in any case, and what it is; and finds that the Supreme Court of the United States erred when it decided the equitable claim of Chouteau's heirs was not set forth in the pleadings herein, and the Supreme Court of Missouri again decides that it was set forth in the pleadings herein, we should have no difficulty in understanding the precise nature of its action, nor in perceiving that its purpose was to disregard the ruling of this Supreme Court on the federal question.

But *res judicata* we are informed is a question of State law; and we are told that if the Supreme Court of the State does not avow its purpose to do so, but simply disregards the opinion of the Supreme Court of the United States, and calls its act *res judicata*, the federal question is put entirely out of the way, and the cause is decided on a local question. The fact remains, however, that these plaintiffs have been prevented from having a decision on their claim of right by the Supreme Court of the United States. And they have been prevented by the act of the State court — that act being the mere use of a *name* — the calling an act of contumacy by the State court *res judicata* without an element of *res judicata* in the judgment. When the Supreme Court of the United States decided that the plaintiffs equitable claim of right was not set forth in the

answer of Chouteau and could not be adjudicated in that cause, the plaintiffs bowed to its authority. Are they now to suffer by it?

In commencing the present suit the plaintiffs confidently relied upon the decision of this court in 13 Wall. 92, 103. They had a right to rely upon it.

4 Minn. 190, Hollingshead v. Van Glahn.
6 Cal. 605, Clary v. Hoagland.
15 Md. 268, Thompson v. Albert.
17 Ark. 608, Lytle v. State.
15 Ala. 609, Price v. Price.

Whatever was decided in 13 Wall. 92, as the law of that case, is the law of this case.

That the equitable claim of right of these plaintiffs was not in issue and not adjudicated in the ejectment is *res judicata* by the judgment of the Supreme Court of the United States.

When the Supreme Court of Missouri rendered *its opinion* in this cause that the matter of plaintiffs petition was *res judicata*, it merely repeated its error committed in 50 Mo. p. 85. It assumed to reverse the action of this court, which it had no power to do; it meant only to say that the ruling of this court, 13 Wall. 92, was wrong, and its own opinion in 50 Mo. 85, was right. The question of power in the State court presented by this record is of the gravest nature.

This court said in Murdock v. City of Memphis, 20 Wall. 632:

"It was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of federal laws, that that question should be decided for him by the highest federal tribunal if he desired it, when the decisions of the State courts were against him on that question. The rights of this character guaranteed to him by the Constitution and laws of the Union, *should not be left*

to the exclusive and final control of the State courts." And this court said:

"It is not to be presumed that the State courts where the rule is clearly laid down to them on the federal question, and its influence on the case fully seen will disregard or overlook it, and this is all that the rights of the party claiming under it require. Besides by the very terms of this statute (§ 709 R. S. United States 1878, p. 133), when the Supreme Court is of opinion that the question of federal law is of such relative importance to the whole case that it should control the final judgment, that court is authorized to render such judgment and enforce it by its own process."

Now the present is the very case suggested in the opinion just quoted. The right of these plaintiffs to the opinion and judgment of the Supreme Court of the United States upon their claim of right is all important, because it involves the constitutional exercise of jurisdiction by this court in behalf of citizens of Missouri whose rights under a law of Congress have been denied by the State court. The plea of *res judicata* so-called, based upon nothing but an attempt to oust the jurisdiction of this court is important *only that it be denied* in support of the jurisdiction of this court. To the plaintiff's rights the federal question was and is so important as to absolutely control the cause. A right decision of it would have put out of the way every local question so-called, raised by Gibson. Manifestly the State court had no right to disobey the mandate of this court and call its act *res judicata*. Its decision was not only in disregard of the opinion of this court, but was without support of any State laws. The Supreme Court of Missouri once before assumed a like authority. Maguire sued Tyler in the State court and failed to recover and brought his case here where the judgment was affirmed. But this court pointed out the course Maguire should pursue to obtain his rights. 1 Black, 195, Maguire v. Tyler. After complying with the directions of this court, Maguire commenced another suit, which the Supreme Court of Missouri dismissed,

holding the plaintiff' s action barred by the statutes of limitations, though there was no such question raised by the evidence; also that the plaintiff's suit was *res judicata* by force of its previous decisions. These decisions of the State court were insisted upon by Tyler as decisions of *local questions*, over which this court had no jurisdiction. This court disallowed such pretenses, would not suffer its jurisdiction to be defeated and granted to Maguire the relief he prayed.

40 Mo. 433, Maguire v. Tyler.
8 Wall 650, Maguire v. Tyler.
17 Wall 253, Maguire v. Tyler.

The jurisdiction of the Supreme Court of the United States is too important to be ousted by any *forms or phrases* to be employed by a State court or by assumption of any power however disguised to limit its constitutional jurisdiction.

S. GLOVER & SHEPLEY,
Attorneys for Charles P. Chouteau.

Office Supreme Court U. S.
FILED.
MAR 10 1894
JAMES H. McKENNEY,
CLERK.

111-200

In the Supreme Court of the United States.

CHARLES P. CHOUTEAU AND JULIA MAFFIT,
PLAINTIFFS,

vs.

CHARLES GIBSON,
DEFENDANT AND RESPONDENT.

Reply by Respondent to the Appellant's Statements of the Record and Argument on Motion to Dismiss.

In the Supreme Court of the United States.

CHARLES P. CHOUTEAU & JULIA MAFFIT,
Plaintiff's,

vs.

CHARLES GIBSON,
Defendant and Respondent.

REPLY BY RESPONDENT TO THE APPELLANT'S STATEMENTS OF THE RECORD AND ARGUMENT ON MOTION TO DISMISS.

There are so many affirmative mistatements and important ommissions of facts in the statement of the case by appellant's counsel that I am compelled to reply lest this high court might err as to the facts shown by the record.

First as to Mr. Gantt's statement, as to the case of Gibson *vs.* Chouteau & Maffit (which I will call the old case.)

Gibson denied :—

1st. That Joseph Herzog was a partner of Christian Wilt or that the proof established that fact.

Herzog claimed under a decree,in Chancery against Wilt's intant heir founded on the allegation that he was such partner and which the State Supreme Court held to be void for want of service on the infant ; (see 39 Mo. also the record itself.)

2d. That Wash conveyed to Pierre Chouteau. The deed of trust required Wash's trustee to sell at *public* sale on ten days notice, and he sold at private sale without notice and the State Supreme Court held the sale and deed void (see 39 Mo.)

3d. That the judgment and sheriff sale of Henry Clay *vs.* Jos. Herzog was against him *individually* and not as surviving partner of Wilt. When the judgment was rendered and sale made, Herzog claimed the land under the void decree. The State Supreme Court held the sale void. His decree in Chancery based on this void judgment and sale was held void for that reason, and also in addition that a mere expectancy or germ of a claim could not be passed by judicial proceedings *in invitem* under the laws of Missouri.

4th. That William MacRee agreed to convey the land to Henry Clay. No such agreement was ever made or is in this record.

5th. That the deed of Samuel MacRee passed the after acquired title. Its execution was not denied, but it was contended that it was made and delivered after Clay's deed to the grantors therein, and that Samuel MacRee had no title at the time under anybody.

6th. It was shown that the only deed ever made to Chouteau by MacRee was in 1838 or 1839; that Chouteau was a stranger to MacRee's bill in Chancery filed in 1844, and that the previous *quit claim* deed to him did not pass the after title acquired by that decree.

All these and many other matters were in issue and tried.

7th. On page 6 of his brief, Mr. Gantt recites that Mrs. MacRee conveyed this land to me as "evidence of her appreciation of the zeal and fidelity manifested by Gibson in her cause" and then stops. Why does he not in common truth-

fulness show in this connection the evidence in this record as to what cause that was?

8th. On pages 6 and 7 he purports to set forth Mr. Chouteau's answer but omits that part in which it is avered that Gibson acquired the title by fraud and held it in trust for him.

9th. On page 7 he purports to give a copy of the judgment or decree of the Land Court, and yet his copy states that the court found the "issue" in the singular, when this record (printed top p. 125) shows that the finding was in the plural, that is that the "issues" were found for plaintiff.

I here state as a fact that the original record was produced on the trial in the Circuit Court below, and Mr. Gantt's mis statement thereby shown. He made the same mis-statement in the Court of Appeals, and again the record was shown to him. In the State Supreme Court he again made the same misstatement and it was still again pointed out to him and this record shown to him, and I now ask this court to look at the record for itself.

I make no comments. None are needed.

10th. He purports to state what the state Supreme Court did on Chouteau's appeal, and he said it reversed the judgment of the Land Court on the statute of limitations, but wholly omits the first decision in 1866, in which it affirmed the judgment as to its jurisdiction to try the equitable rights and its decision against Chouteau on that right; the subsequent re-hearings granted, and trial, months afterwards; argument on the whole case, legal and equitable, and its affirmance a second time of the previous decision as to the equitable title, (39 mo. 556) for "*three reasons*," either deemed sufficient, to prove that Chouteau had not acquired the equitable title, and that this "appeared so manifest as not to require discussion at length."

11. He purports to recall to this Court what it had done, but omits all allusion to the motion of Glover and Sheply and Hill, of Mr. Chouteau's counsel in 1869 to dismiss my first writ of error, or the decision of the Court thereon.

12. He purports to state what the decision now appealed from was and yet states only *one* of the several reasons which the Court gives why the former recovery was a bar.

13. He states on p. 15 that "Chouteau set up none but legal defences" which is not true, as held by the State Supreme Court in 1866, 1867, 1869, 1873 and 1882, and beyond question so held by this Court in 1869 (8th Wal.) He says the Judge of the Land Court expressly "declared that nothing but the legal title was before him." This is untrue. Under the practice in Missouri, the plaintiff's legal title and any affirmative defense in law or equity are tried together. The Land Court instructed as to the legal claim of plaintiff. As to the defendants equity no instructions could under the Missouri practice be given. The appeal took up all the equitable defense and all propositions it presented without instructions.

14. On page 16 he says the Supreme Court of Missouri in its opinion "in March 1867" "wholly abandoned" its previous opinion in matters other than limitation. This is untrue. The Court not only affirmed its rulings as to the branch of the case other than that of limitation but declares its rulings were so manifestly right as not to need discussion at length. (39 Mo. p. 556.)

15. His statement on pp. 10 and 17 as to the opinion of the Court of Appeals flatly conflicts with the statement of the same by the Supreme Court below, (printed record p. 265.) It is utterly immaterial what the Court of Appeals said, as it was only a "half-way house."

16. Mr. Gantt p. 44 and fol. refers to my argument below

as to Chouteau's right under the act of 1839 to interpose his equity under his answer, if he chose, and illustrates himself by calling it an "unwarrented operation," a "juggle," "scandalous indecency, &c" He assails the State Supreme Court as seizing upon a "flimsy pretext," and in various phrases endeavors to show that it was disobedient or rebellious to this Court in so deciding. In all the Courts below my argument on the question was strictly confined to a recital and certified copy of the written arguments of Glover and Sheply and Hill before this high court in 1869, on the motion to dismiss my first appeal; to the decision of this court affirming their views, and a recital of my own argument against Mr. Chouteau's right to have his equity tried, and which this court decided against me. When a Mexican scorpion is cornered he turns around and bites himself and dies of his own poison.

17th. He says the judgment is not a bar because I recovered the possession of part only of the 64 acres. The patent conveyed but one tract. Chouteau in that case, as in this, claimed that the equitable title to the whole 64 acres belonged to him and that I held the legal title under a resulting trust for him. Possession by me or him had nothing to do with that issue. If I held any part of the land in trust I so held it all. This court has so often decided the question in bond and other cases that I am sure I need quote no authority on this point. A judgment in one case that I did not obtain the legal title for his benefit is *res judicata* and an estoppel in every other case where the same question arises between the same parties.

18th. The Supreme Court of Missouri has in many cases, other than this, held that a decision of a question of law, such for instance as the construction of a deed or contract, once decided could not be reagitated between the same parties. It so held in a most important case in which this same Mr. Charles P. Chouteau urged them so to hold, (Choteau *vs.*

Allen, Mo. p.) There is no justification for the assault Mr Gantt makes on the Supreme Court of Missouri, nor the slightest foundation for his attempt to create a prejudice in this high court against that tribunal.

19th. Every time this case has been argued Mr. Chouteau's counsel refers in florid terms to the patent having been issued to Mrs. MacRee directly, and every time I have replied that the legal title would inure to the equitable title and so it made no difference in whose name the patent issued.

I reiterate that in all these twenty-one years I have always and flatly admitted that doctrine, and I reiterate it now. But what has that to do with the jurisdictional question?

AS TO GLOVER & SHEPLY'S BRIEFS.

These gentlemen file a regular argument on the merits. If this court cannot determine what questions have been put at issue and determined without hearing an argument on the merits it were better to abolish the right to move to dismiss.

I will argue the merits (and with perfect confidence of success) if ever called upon to do so.

AS TO THEIR SIXTEENTH PROPOSITION.

The State Circuit Court dismissed their bill with costs. Was not this a judgment against them on every proposition that bill presented for trial? If the points they state were involved in the case, they were decided, and if not in the case they are irrelevant and no cause for reversal. The former recovery was set up by me as a defense, and not as a counter claim or any affirmative demand, and being a defense, was of course, included in the judgment of dismissal, with costs.

AS TO THEIR SEVENTEENTH PROPOSITION.

The opinion of the Supreme Court below in this case will speak for itself. But it is untrue that I relied wholly on the decision and judgment of the Supreme Court of Missouri in 50 M. p 85. I did rely on it as a new judgment rendered unquestionably on the legal and equitable title, both as shown by its own opinions and direction, but then I relied also on the judgment of the Land Court and which it affirmed. I also relied on it as authority. Glover and Sheply and myself argued the question, as the briefs show, and invited the decision as to *res judicata*.

AS TO THEIR EIGHTEENTH PROPOSITION.

If *res judicata* was not pleaded in all the forms of Missouri practice by General Noble and myself, then it is impossible to frame such a plea under those laws, and if the decison below does not imply that *res judicata* was well pleaded, it implies and decides nothing, and it is not in the power of the Supreme Court to decide anything which will affect these appellants injuriously.

On page 66 (their brief) they purport to give a copy of my petition in the old case. It is not a copy, and the difference is most material. (See the petition, printed record, p. 118.)

On page 67, they purport to give what they call the "verdict" and "the judgment," and make them appear as if they were distinct, separate and several. This is deceptive and wholly untrue. I pray the court to look at the decree itself; on top of page 125 of this printed record. It is all in one judgment just as the statutes of Missouri require it to be.

The whole case, legal and equitable, being submitted to the court, on the pleadings and proofs it "finds the issues herein for the plaintiff," and "it is *therefore* ordered and adjudged" that plaintiff recover possession. That is, his recovery is the result of and based on the finding of all the

issues in his favor. The finding of the issue in his favor was all the court could do, and the award of possession, damages, etc., was all it could give, even if the equitable defense had been set forth in due form, for that was all the plaintiff needed or did not have already.

The Missouri practice acts have abolished all forms as to judgments and decrees, and this judgment is a full response to all the issues made both by plaintiff and defendant and nothing more is required in that state. This point was argued below fully and the Missouri Supreme Court did not deem it worthy of notice.

"A judgment is the final determination of the rights of the parties in the action." Mag. Stat., top of page 1051. Practice Act 1 art. 9. "Only *one* final judgment shall be given in the action." (Ib. Sec. 8.)

AS TO THEIR NINETEENTH PROPOSITION.

In the court below I showed that there were *two* actions given by the statutes of Missouri—one a possessory action merely for the possession, called an ejectment, another for the recovery of the land itself, in which a party sets out his title and recovers the thing itself or nothing, and which is a "civil action" under the code in the nature of a writ of right, and that my petition set forth a perfect title, and was a civil action. The court held for me on the point. Was there any federal question in that?

2. I claimed that after the Courts had forced me to trial on the general averments in the answer, and the appellants had had a full and fair trial on the merits they could not set up the defect in their own pleadings to avoid the bar of the judgment.

The Court below, following a long series of its own decisions, held for me.

Was there any federal question in that?

3. I quoted on my side now the peculiar statutes of Missouri from 1839 down to the present time which provide that in all cases under a New Madrid location, the plaintiff cannot recover unless he is clothed with both the equitable and legal titles, and that the mere general issue in the answer in such cases authorizes the defendant, if he so chooses, and Mr. Chouteau did so elect, to try the whole equitable and legal titles, and I quoted 10th Mo 360.

The Court held this also for me and was there any federal question involved in that?

In a closely printed brief of seventy-one pages these gentlemen have no room to make the faintest allusion to their own able and successful argument before this court in this very case in 1869. Nor to the decision of *this* Court in their favor on this very proposition which turns out now to be in my favor.

When counsel persuade a Court, at one term, to decide a proposition in their favor, and finding it, after all, fatal to their client, appear before the same Court at another term and endeavor to get it to decide just the other way, one would expect that they would, in the merest candor to the Court, make some excuse or explanation, or at least some allusion to the first argument, but these gentlemen do not condescend to do so.

I submitted this proposition in all the lower Courts on their own arguments and I do so now. Here it is.

Eighth extract from briefs of Glover and Sheply, (This printed record p. 216.)

"8. If the patent merely conveyed the legal title, leaving "Chouteau's equities outstanding, the plaintiff was not en- "titled to recover on a bare New Madrid title or a bare legal "title. The plaintiff must have the best equitable title "also, or he has no standing in Court."

"In 1839 the case of Bagnell *vs.* Broderick was decided. "(13 Peters, 436.) In that case Robertson, who had owned "the claim, sold and conveyed it. Eleven years afterward "he took a patent on the same claim, and that patent was set "up against Robertson's vendee. A majority of the judges

" (held) that in an ejectment in a federal court the patent " must prevail (13 Peters, 450, Justice McLean dissenting), " insisting the fraud could be shown in ejectment (Ib. p. 457 " to 458 inclusive ; see his opinion). All the judges were of " opinion that on the chancery side of the court, the rights of " Byrne, the equitable owner of location under Robertson's " deed, could be set up; that is, that the vendee of Robertson " was honestly entitled to the land. What was to be done ? " All the title papers in New Mradrid cases were to some one " or his legal representatives. The legislature of Missouri " determined to open (the) door to equitable titles in these " cases. So they passed an act declaring (1) that in a New " Madrid case a patent should be only *prima facie* evidence " of title in its grantee. (2) That the title to land located by " a New Madrid certificate should be determined in an eject- " ment according to the equitable right of the parties. (Ses- " sion of acts 1838-9, §§ 2 and 3.) The revision of 1845, " copied the act (p 442, §§ 12 and 13). In 1849 the new code " of practice was adopted establishing (abolishing) distinc- " tions of pleadings in respect to law and equity.

"In 1855 the revision omitted the word equitable but again " declared a patent only *prima facie* evidence in ejectment, " and provided the suit should be determined according to " the rights of the parties to the land, "meaning, of course, to " recognize other rights than those of the patentee. By vir- " tue of this statute, in actions of ejectment concerning New " Madrid locations, a Court of law has the same power as a " Court of equity." (10 Mo. R 260.) In this case the defend- " ant, who had no title, set up an outstanding equitable title " and defeated the plaintiff. If then, Chouteau had the best " equity, and only equity, which undoubtedly was the fact, " the plaintiff could not recover."

This is the extract from Mr. Hill s brief, the other counsel for Mr. Chouteau, (see this printed record, p. 218.)

"6th. By statute of 1855, title ejectment, (p. 692,) section 11 " and 12, it is enacted that the title to the land located by " virtue of such, (J. Y. O. Carroll) certificate or patent, (Mary " MacRee, assignee of O. Corroll,) shall be determined accord-

" ing to the right of the parties to the land, as located by
" virtue thereof.

"This statute was passed for the purpose of meeting the "hardship and technical injustice of the rule established in the " case of Bagnall *vs.* Broderick, 13 Peters, and to prevent circu- " ity of action, and an appeal to a Court of Equity. (section 12 " of the said act, p. 692), declares that the real owner of the title " shall prevail and that the patent, to whomsoever issued, shall " only be *prima facie* evidence of the title of patentee. See also " act of 1839, 1845 in *pari materia*. This statute is not ambi- " guous. It gives to the defendant in this action (Chouteau) the " clear right to defend against the patent to whomsoever issued " and to show who is the real owner of the title.

"7th. The General Assembly of Missouri had full power and " thority to declare that such patent should inure to the bene- " fit of the real party in interest, the real owner of the land " injured by earthquakes and the real owner of the lands lo- " cated in lieu thereof.

"It is a rule of evidence, of property, and of practice in an " ejectment suit in this state over which the General As- " sembly has full control and no valid objection can be made " to the validity and efficacy of the act."

Either one of the propositions decided in my favor is sufficient to sustain my motion to dismiss.

Let us examine the short opinion of the three judges—a majority, and therefore the court.

They do not state on what particular grounds they hold the bar to be good. If there be (which I deny) federal and local questions, it is not shown how they were decided, and certainly they were not by implication decided against appellants. They are appellants and are here complaining that an erroneous decision of a federal question was the foundation of the judgment against them. They fail to do this. The judgment might have been against them on the local questions. This was the very point decided by this high court against me (in 8th Wall), and I now rely on the decision with perfect confidence that this great court will not

decide against me, or in favor of Mr. Chouteau, first on one side and then on the other.

My own course was and is this: In all the Courts below, and in the first argument in 1869, in this Court, reported in 8th Wal, I insisted that Chouteau could not set up, or interpose and try, his claim to the equitable title in the case, but after *all* the Courts had decided against me,

I submitted, as a lawyer should, and on the second argument and trial in this court, reported in 13 Wal. I did not insist that the equities could not be tried. I relied then as I do now, on the decisions against me then but in my favor now.

The record as then made showed that the decision below as to the equitable title was in my favor, and this court had unanimously held in the very case that such decisions were local and final, and of course I would no longer urge such a point at that time.

C. GIBSON,
Prosecutor.

111-202

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 277.

WILLIAM ASTOR, PLAINTIFF IN ERROR,

vs.

EDWIN A. MERRITT, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 16, 1881.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between William Astor, plaintiff, and Edwin A. Merritt, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed July 28, 1881.
SAM'L BLATCHFORD.

(Endorsed:) U. S. Supreme Court. Wm. Astor *agst.* Edwin A. Merritt. No. 5733. Writ of Error.

Due service of a copy of the within writ of error is admitted. July 29, 1881. Stewart L. Woodford, U. S. Atty., for deft. Lord, Day & Lord, 120 Broadway, pltff's attys. U. S. Circuit Court. Filed July 29, 1881. Joseph M. Deuel, clerk.

2 UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK, } *ss.*

I, Joseph M. Deuel, Clerk of the Circuit Court of the United
3 States of America for the Southern District of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify, that the following pages, num-

bered from four to seventy-seven inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William Astor, plaintiff in error, against Edwin A. Merritt, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the second circuit, this twelfth day of August, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

4 The President of the United States of America to the Judges of the Supreme Court of the State of New York, greeting:

[L. S.] We, for certain reasons, being desirous that our Circuit Court of the United States for the Southern District of New York, in the second circuit, shall be certified of a certain cause commenced before you against Edwin A. Merritt, defendant, by William Astor, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 1 day of March, 1879, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 26 day of Feb'y, in the year one thousand eight hundred and seventy-nine.

JOHN I. DAVENPORT, *Clerk.*

STEWART L. WOODFORD,
U. S. Attorney,
Attorney for Defendant.

5 (Endorsed:) 5733. U. S. Circuit Court. William Astor vs. Edwin A. Merritt. Copy certiorari. Stewart L. Woodford, U. S. Attorney, attorney for defendant.

Take notice, that the within is a copy of a certiorari, this day issued out of the Circuit Court of the United States for the Southern District of New York. New York, Feb'y 26, 1879. Yours, Stewart L. Woodford, U. S. Attorney, attorney for defendant. Filed Feb'y 27, 1879.

6 The answer of the Justices of the Supreme Court of the First Judicial Department of the State of New York within named.

A transcript of the record whereof mention is within made, together with all things touching or in anywise concerning the same.

We certify, under the seal of our said court, to the Justices of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed, as within it is commanded.

By the court,

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

Dated New York, May 1, 1879.

7 Supreme Court.

WILLIAM ASTOR, PLAINTIFF, *against* EDWIN A. MERRITT, DEFENDANT. } Trial to be had in New York County. Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated February 4th, 1879.

LORD, DAY & LORD,
Plaintiff's Attorneys.

Office and post office address, No. 120 Broadway, New York City.

8 (Endorsed:) Supreme Court. William Astor, plaintiff, against Edwin A. Merritt, defendant. Summons. Lord, Day & Lord, plaintiff's attorney, 120 Broadway. U. S. Circuit Court. Filed Mar. 3, 1879. John I. Davenport, clerk.

9 Circuit Court of the United States, Southern District of New York.

WILLIAM ASTOR, PLAINTIFF, *against* EDWIN A. MERRITT, DEFENDANT. }

The plaintiff, by Lord, Day & Lord, his attorneys, complaining of the defendant, respectfully shows to the court and alleges—

First. That the defendant is, and was at and during the times hereinafter mentioned, Collector of the Customs of the United States at the Port of New York, residing in said southern district of New York.

Second. That on the 22d day of September, 1878, plaintiff arrived at said port from Liverpool, England, as a passenger of the steamship "Germanic," of the Oceanic Steam Navigation Company (limited), being accompanied at the time by his wife,
10 three daughters, one son, and two servants, who were also passengers on the same vessel, and who had been traveling

for some time with plaintiff abroad in England and on the Continent of Europe, and were returning with him by said vessel to his home in the City of New York.

Third. That among the baggage which plaintiff and his said family brought with them on said vessel to said port was certain wearing apparel in actual use and certain other personal effects, not merchandise, all of which had been purchased abroad by plaintiff for the use of himself and his said family, and which were then in actual use within the meaning of the statute in that case made and provided.

Fourth. That when said baggage was examined by defendant's agents, the officers of the customs at said port, on said arrival of said vessel, plaintiff claimed that said wearing apparel was in actual use and, together with the said personal effects, was ex-
11 empt and free from the payment of any duty, but that, notwithstanding his claims and statements in that behalf (all of which were true), the defendant, by his said agents, ascertained, liquidated, and demanded payment of duties upon said wearing apparel and personal effects at the following valuations, rates, and amounts, that is to say:

	Value.	Rate.	Duty.
On 45 lbs. wool & worsted wearing apparel	$990	50c. lb., $22 50 40 p. c. 396	$418 50
On cotton wearing apparel	150	35 p. c.	52 50
" leather gloves	250	50 p. c.	125
" silk wearing apparel	2,140	60 p. c.	1,284
Making in all			$1,880

Fifth. That in order to obtain possession of said wearing apparel and personal effects and to save the penalties, losses, and inconveniences which were threatened in case of non-payment of the duties so demanded, plaintiff paid the same to defendant in gold coin of the United States, protesting at the time, as well as afterwards, that said wearing apparel and personal effects were free and
12 exempt from any duty, and that the demand, exaction, and payment of said duties were unlawful and improper.

Sixth. And the plaintiff further alleges that the ascertainment, liquidation, and payment of the duties as aforesaid were all made on said 22d day of September, and that within ten days thereafter, and on the 30th day of said September, plaintiff, being dissatisfied with defendant's decision, caused a notice or protest in writing to be given to the defendant, setting forth distinctly and specifically the grounds of his objection thereto, a copy of which, together with a copy of an affidavit of service of the same on the defendant, is hereto annexed, marked "Schedule A," to which plaintiff for greater accuracy refers.

Seventh. That within thirty days after the ascertainment and

liquidation aforesaid, and on the 19th day of October, 1878, plaintiff duly appealed to the Secretary of the Treasury of the
13 United States from said decision of the defendant, praying that the same might be reversed and the defendant directed to refund to plaintiff the duties exacted and paid as aforesaid, with about the 6th day of November, 1878, plaintiff received the decision in interest thereon from the said 22d day of September, and that on or writing of said secretary, bearing date the 5th day of said November, concurring with and sustaining said defendant's desision, and holding the said duties were lawfully demanded, exacted, and paid, and refusing the plaintiff's application for the refunding thereof.

Eighth. That the bill of particulars hereto annexed, marked "Schedule B," states correctly the name of the importer and the description of said wearing apparel and personal effects, the place from which they were imported, the name of the vessel of
14 importation, the date of entry at the custom house (as plaintiff is informed and believes), the precise amount of duty claimed to have been exacted in excess, the date of payment of said duties, the day and year on which protest was filed against the exaction thereof, the date of appeal thereon to the Secretary of the Treasury, and the date of decision on such appeal, and plaintiff says that he knows of no invoice of said wearing apparel and personal effects, and hereby refers to said bill of particulars as part of this complaint.

Ninth. And the plaintiff still claims and alleges that said wearing apparel was at the time said duties were exacted and paid in the actual use of himself and his said family, and that the personal effects aforesaid were not merchandise, and that said wearing apparel and personal effects had all been purchased by plaintiff for such use, and not directly or indirectly for the use of any
15 other person, or intended for sale, and were not merchandise, and therefore are and then were exempt and free from payment of any duty whatever; and that plaintiff is the lawful owner of the same, but that the defendant, although duly requested thereto as hereinbefore alleged, has neglected or refused to repay to plaintiff said sum of one thousand eight hundred and eighty dollars, United States gold coin, so erroneously and unlawfully demanded, exacted and paid as aforesaid, or any part thereof, and that said sum, with gold interest thereon from said 22d day of September, 1878, is due and owing to this plaintiff by the defendant.

Wherefore the plaintiff demands judgment against the defendant for said sum of one thousand eight hundred and eighty $\frac{0}{000}$ dollars gold coin of the United States, with gold interest thereon
16 from said 22d day of September, together with his costs and disbursements in this action.

LORD, DAY & LORD,
Plaintiff's Attorneys.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

William Astor, being duly sworn, saith that he is the plaintiff named herein, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes the same to be true.

WM. ASTOR.

Sworn to this eighth day of April, A. D. 1879, before me.

[SEAL.] GEO. WADDINGTON,
Notary Public, City and County of N. Y.

17 *Schedule A.*

To Edwin A. Merritt, Esq., Collector of the Port of New York.

The sum of eighteen hundred and eighty dollars (gold) charged to me for customs on the wearing apparel, including leather gloves, specified in the annexed schedule, is paid by me under protest, on the ground that the said articles are not merchandise, but wearing apparel belonging to me and my family in their actual use, and as such not subject to payment of duty; that the payment is made to save the penalties and other losses and inconveniences which are threatened in case of non-payment, and that I shall hold you responsible for the amount, with interest.

New York, Sept. 22, 1878.

(Signed) WM. ASTOR.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.*

18 Edward Wells Southworth, being of full age and duly sworn, saith that on the 30th day of September, 1878, at New York City, in said county, he personally served upon said Edwin A. Merritt two duplicate protests, of which the annexed is a true copy, by then and there personally delivering to and leaving the same with the said Edwin A. Merritt; and this deponent further states that he knows the person served as aforesaid to be the person mentioned and described in said protest as Edwin A. Merritt, collector of the port of New York.

(Signed) EDWIN WELLS SOUTHWORTH.

Sworn to before me, this 18th day of October, 1878.

GEO. B. DORSETT,
Notary Public, Kings and N. Y. Co.

Schedule.

		Value.	Rate.	Duty.
45 lbs. wool and worsted wearing apparel		$990	50 lbs., $22 50 40 p. c., 396	$418 50
	Cotton wearing apparel	150	35 p. c.	52 50
19	Leather gloves	250	50 p. c.	125
	Silk wearing apparel	2,140	60 p. c.	1,284
				$1,880

20 *Schedule B.*

Circuit Court of the United States, Southern District of New York.

WILLIAM ASTOR, PLAINTIFF,
vs.
EDWIN A. MERRITT, DEFENDANT.

Bill of Particulars.

The plaintiff presents the following bill of particulars in this action, pursuant to the statute in such case made and provided.

1. Name of importer: Plaintiff, William Astor.

2. Description of the wearing apparel and precise amount of duty claimed to have been exacted in excess:

	Value.	Rate.	Duty.
45 lbs. wool and worsted wearing apparel	$990	50 lb., $22 50 40 p. c. 396	$418 50
Cotton wearing apparel	150	35 p. c.	52 50
Leather gloves	250	50 p. c.	125 00
Silk wearing apparel	2,140	60 p. c.	1,284
Totals, all of which is claimed to have been exacted in excess			$1,880

21 3. Place from which imported: Liverpool, England.

4. Name of vessel: Steamship "Germanic" of the Oceanic Steam Navigation Company (limited).

5. Date of invoice: plaintiff knows of none.

6. Date of entry at the custom house, September 22, 1878.

7. Date of payment of the duties, " " "

8. Day and year on which protest was filed against the exaction thereof, September 30, 1878.

9. Date of appeal to the Secretary of the Treasury, October 19th, 1878.

10. Date of decision upon such appeal, Nov'r 5, 1878.

LORD, DAY & LORD,
Plaintiff's Attorneys.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

William Astor, being duly sworn, saith that he is plaintiff herein; that he has read the foregoing bill of particulars and knows the contents thereof, and that the same is true of his own
22 knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes the same to be true.

WM. ASTOR.

Sworn to this 6th day of April, A. D. 1879, before me.

[SEAL.] GEO. WADDINGTON,
Notary Public, City and County N. Y.

(Endorsed:) U. S. Circuit Court, Southern District of New York. William Astor vs. Edwin A. Merritt. Complaint and bill of particulars. Lord, Day & Lord, attorneys for plff., 120 Broadway, New York.

Due service of a copy is hereby admitted.
N. Y., April 8, 1879.

STEWART L. WOODFORD,
23 *U. S. Attorney, Atty. for Deft.*

24 United States Circuit Court, Southern District of New York.

WILLIAM ASTOR
versus
EDWIN A. MERRITT, COLLECTOR, ETC.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiff in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and, in such official capacity received payment from the plaintiff for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiff into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiff at the times in said complaint mentioned, were paid by said plaintiff as a debt due by him to the United States, and not otherwise; and were received by defendant by virtue of his office as said collector and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith, thereafter, and before the commencement of this action, or the service of any protest, paid into the Treasury of the United States; and that the amount of said moneys, so received from plaintiff, were the amounts due from him to the United States according to the

rate of duty imposed by law upon the several articles of merchandise by him imported and assessed with duty, and no other sums than duties regularly assessed, and ascertained and liquidated according to law upon the plaintiff's import entry thereof, were collected or received by defendant from the plaintiff.

III. And defendant, further answering, denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint, by the marks and numbers and description there given, except in so far as to state, and defendant herein answering doth aver and state, that said merchandise was not dutiable according to the laws of the United States, at the rates specified in the complaint.

IV. And defendant, further answering, admits that plaintiff filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiff, conformable to the laws of the United States, and defendant leaves plaintiff to make such proof thereof as he may be advised.

V. And as to any other allegations in said complaint contained, not hereinbefore fully answered or omitted, defendant denies the same, and each thereof, and leaves the plaintiff to make such proof thereof as he may be advised.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney,
Attorney for Defendant.

25 SOUTHERN DISTRICT OF NEW YORK, } ss:
CITY AND COUNTY OF NEW YORK, }

Edward A. Merritt, being duly sworn, says that he is the defendant above named, that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

E. A. MERRITT.

Sworn to before me, this 11th day April, 1879.
GEO. HILLEN,
Notary Public, New York County.

(Endorsed:) 5733. U. S. Circuit Court, Southern District of New York. William Astor vs. Edwin A. Merritt, collector, etc. Answer. Stewart L. Woodford, United States Attorney, attorney for defendant. U. S. Circuit Court. Filed Apr. 14, 1879. John I. Davenport, clerk.

26 At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Thursday, the 28th day of October, in the year of our Lord one thousand eight hundred and eighty.

Present: The Honorable Nathaniel Shipman, Circuit Judge.

WILLIAM ASTOR
vs.
EDWIN A. MERRITT. } 5733.

This cause being still on trial, the jurors sworn in it are called and severally answer to their names, except the said juror, William M. Newman.

Counsel for the respective parties consenting—

Ordered, that the trial of this case proceed with the eleven remaining jurors.

The court denies the motion made herein on the 27th day of October, 1880, to direct the jury to find a verdict for the defendant.

A. B. Herrick, Ass't U. S. Attorney, of counsel for the
27 defendant, excepts to the ruling of the court in so doing.

Mr. Herrick sums up the case on the part of the defendant.

Mr. Lord sums up the case on the part of the plaintiff.

Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiff for the sum of seven hundred and thirty-seven dollars ($737.00) with interest thereon from September 22, 1878, and so say they all. On motion of Thomas C. Greenwood, Assistant U. S. Atty, of counsel for defendant, ordered that defendant have a stay of proceedings for 60 days within which to prepare and serve a bill of exceptions herein.

On like motion, ordered that a certificate of probable cause be entered herein.

Prior to the retiring of the jury, plaintiff excepts to certain portions of the charge.

A copy:

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

28 Circuit Court of the United States, Southern District of New York.

WILLIAM ASTOR
against
EDWIN A. MERRITT.

Judgment, July 14, 1881.

This action having come duly on for trial at a stated term of this court, held at the court-rooms thereof, in the city of New York, be-

fore the Hon'l Nathaniel Shipman, sitting as circuit judge, and a jury, and said action having been tried on the 27th and 28th day of October, 1880, and the jury having rendered a verdict in favor of the plaintiff for the sum of seven hundred and thirty-seven dollars, with interest thereon from the 22d day of September, 1878, and the plaintiff's costs having been duly taxed at the sum of forty-nine $\frac{85}{100}$ dollars:

Now, on motion of the court, it is hereby adjudged that the plain-
29 tiff recover of the defendant the amount of said verdict with interest as aforesaid, amountiug together to eight hundred and forty-one $\frac{68}{100}$ dollars, with interest thereon from the date of said verdict, viz: said 28th day of October, 1880, amounting to thirty-five $\frac{91}{100}$ dollars, and also the said sum of forty-nine

$841.68	$\frac{85}{100}$ dollars for his said costs, making in all the sum of
35.91	nine hundred and twenty-seven $\frac{44}{100}$ dollars.
49.85	Judgment signed this 15th day of July, A. D. 1881.
$927.44	JOHN A. SHIELDS, *Deputy Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District of N. Y. William Astor *vs.* Edwin A. Merritt. Judgment U. S. Circuit Court. Filed July 15, 1881. Joseph M. Deuel, Clerk.

30 Circuit Court of the United States for the Southern District of New York, in the second circuit.

WILLIAM ASTOR *against* EDWIN A. MERRITT. } No. 5,733.

Plaintiff's proposed Bill of Exceptions.

Afterwards, to wit, on October 27, 1880, at a stated term of this court, begun and held at the city of New York, before the Honorable Nathaniel Shipman, district judge of the United States for the district of Connecticut, appointed to hold said circuit according to the form of the statute in such case made and provided, the aforesaid issues, so joined as between said parties, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, the said plaintiff being represented by George De Forest Lord, his counsel, and the defendant by
31 Albert B. Herrick, Esq., and Frank H. Platt, Esq., assistant United States attorneys.

And, in the course of the trial, plaintiff's said counsel did take and allege sundry exceptions to the rulings of the court in refusing to charge certain matters and things which the plaintiff duly requested to be charged, and in charging the jury as hereinafter set forth, all of which exceptions are hereinafter particularly shown.

The plaintiff, to sustain the issues on his part, testified in his own behalf that, in the summer of 1878, he, a citizen of the United

States, was traveling in Europe with his wife, three daugters, and son, also citizens of the United States, and two servants, and returned to this country, with his said party, arriving in New York on the steamer "Germanic" on September 22, 1878. That he had in his personal baggage certain wearing apparel belonging to himself and other members of his family, purchased in Eu-
32 rope during such summer, upon which the collector of the port of New York, upon his arrival, as aforesaid, demanded and exacted duties, and that the plaintiff was consequently obliged to and did pay the duties so demanded and exacted to said collector in order to get possession of said wearing apparel.

That the following is a correct statement of the articles upon which such duties were exacted and paid and the rate and amount of duty so exacted:

	Value.	Rate.	Duty.
On 45 lbs. wool & worsted wearing apparel	$990	50c. lb., $22 50 / 40 p. c. 369	$448 50
" cotton wearing apparel	150	35 p. c.	52 50
" leather gloves	250	50 p. c.	125
" silk wearing apparel	2,140	60 p. c.	1,284
Making in all			$1,880

Plaintiff further testified that the various articles of wearing apparel contained in the foregoing list belonged to him, that he paid for them all, and that they were intended for the personal use of himself and his family aforesaid, and that the articles for his own and his son's use were such articles of wearing apparel as
33 they ordinarily wore at that season of the year, and that they were principally intended for use in the winter, and that they were in no sense imported by him as merchandise. That some of his own and his son's wearing apparel had been actually worn by them personally, and that he explained that fact to the custom house authorities at the time of the exaction of the duties.

The plaintiff further testified that afterward, and within ten day after the ascertainment and liquidation of said duties, he made protest in writing to said collector.

Which, with proof of personal service thereof on said collector on September 20, 1878, plaintiff's counsel put in evidence, the same being in words and figures as in Schedule A, annexed to the complaint contained in the record hereto annexed.

The plaintiff then further testified that said collector re-
34 fused to refund the duties so exacted and paid, and that thereupon, and within thirty days after the date of such ascertainment and liquidation, he appealed from said collector's said decision to the Secretary of the Treasury of the United States.

Plaintiff's counsel here put in evidence said appeal, in words and figures as follows:

To the Honorable John Sherman,
Secretary of the Treasury, Washington, D. C.

The undersigned, William Astor, appealing from a decision of Edwin A. Merritt, Esq., collector of the port of New York, as to the rate and amount of certain duties claimed by said collector, and paid by the undersigned under protest, respectfully shows:

First. That the undersigned arrived at the port of New York as a passenger in the steamship "Germanic," from Liverpool, on Sunday, the 22d day of September, 1878, being accompanied at the time by his wife, three daughters, one son, and two ser-
35 vants, who were also passengers in the same vessel.

Second. That he and his family had been traveling for some time abroad, in England and on the Continent of Europe, and were returning in said vessel to their home in the City of New York.

Third. That among other baggage and personal effects which they brought with them were certain quantities of wearing apparel of wool and worsted, cotton and silk material, and certain leather gloves, all of which had been purchased abroad by the undersigned for the use of himself and his said family, and not as merchandise, and all of which was then in actual use by them.

That when the said baggage was examined by the officers of the customs, on the arrival of the said vessel at the port of New York as aforesaid, the undersigned stated and claimed that the said wearing apparel and leather gloves were in actual use and were
36 therefore not subject to the payment of duties, but should be admitted free, but that notwithstanding his said claims and statements in that regard (all of which were true), the said officers of the customs demanded duty upon the following articles, and at the following valuations, rates, and amounts, that is to say:

	Value.	Rate.		Duty.
On 45 lbs. wool and worsted wearing apparel.....	$990	50c. lb., 40 p. c.	$22 50 396	$478 50
" cotton wearing apparel.....	150	35 p. c.		52 50
" leather gloves.....	250	50 p. c.		125
" silk wearing apparel.....	2,140	60 p. c.		1,284
Making in all.....				$1,880

Fourth. That in order to obtain possession of said articles and to save the penalties, losses, and inconveniences which were threatened in case of non-payment of the duties so demanded, the undersigned paid the same, protesting at the time as well as afterwards that said articles were not dutiable, and that the demand and exaction of said duties was unlawful and improper, and that the ascertainment and liquidation and payment of the duties
37 aforesaid, all were made on said 22d day of September, 1878.

Fifth. That afterwards, and on the 30th day of September, 1878, the undersigned caused a written protest against the demand and exaction of the duties aforesaid to be duly served upon Edwin A. Merritt, Esq., the collector of the port of New York, a copy of which is hereunto annexed, together with an affidavit of service of the same, but that the said collector has neglected or refused to regard said protest or to return the duties so exacted and paid.

Sixth. That the undersigned is ready at all times to prove that the said wearing apparel and gloves were, at the time of the exaction and payment of the duties aforesaid, in the actual use of himself and the other members of his family aforesaid, and on that account were exempt from duty under the true meaning and intention of the statute in such case made and provided.

38 Wherefore the undersigned respectfully appeals from the decision of Edwin A. Merritt, Esq., collector as aforesaid, in demanding and receiving the duties aforesaid, and respectfully requests that said decision may be reversed, and the said collector be directed to refund to the undersigned the sum of eighteen hundred and eighty ($1880) dollars aforesaid, with interest thereon from the date of the payment thereof, to wit, the 22d day of September, 1878.

Dated New York, Oct. 17, 1878.

WM. ASTOR.

Annexed to said appeal was a copy of the protest and proof of service thereof, as contained in Schedule A of the complaint aforesaid.

Evidence was further adduced proving service of said appeal on said secretary personally on October 19, 1878.

Plaintiff then further testified that said secretary denied said appeal, and that plaintiff thereupon directed this action to be brought.

39 Upon cross-examination, the plaintiff further testified that the trunks containing the wearing apparel were examined on the dock; that he made a declaration, declaring as dutiable certain other articles which he brought with him, and characterizing them as personal effects and wearing apparel in actual use, (not merchandise), and that he also produced receipted bills for the articles upon which duties were exacted as aforesaid for the use of the appraisers.

That said articles of wearing apparel of plaintiff and his son were purchased by plaintiff with the intention of using them wherever he and his family might be; that he did not know, when he purchased them, how long he was going to remain abroad. He knew nothing about the ladies' apparel.

On re-direct examination, the plaintiff further testified that his own and his son's wearing apparel, when they were purchased

40 at Paris and sent home, were placed in with their other wearing apparel so as to form part of their ordinary wardrobes;

that if they had been detained in Europe, the garments were such as they would have required the moment the weather grew cool, and that they were brought for use whenever the weather should make it proper to use them and without reference to where he or his son should be at the time they encountered cold weather.

Further to sustain the issues on the part of the plaintiff, Caroline W. Astor, his wife, testified that the garments of ladies' wear contained in the baggage aforesaid were generally dresses and cloaks of woolen, worsted, and silk and linens, intended entirely for her own and her daughters' use, and which had been purchased under her supervision in Paris.

That said garments were intended for the separate and individual use of herself and daughters as soon as it was cold enough
41 to wear them for the approaching season; that some were adapted for ordinary wear and some for balls and entertainments, and that all were made upon measure. That the aggregate quantity of wearing apparel which formed part of the baggage of herself and daughters rather fell short of their usual supply of such articles for that season of the year, and that witness was obliged, after she arrived in this country, to have some dresses made. That none of said articles were purchased for sale or exchange, but only for the special use of the persons for whom they were made. That when they were purchased and sent home from the persons who made them, they were placed indiscriminately in with the wardrobe of the particular person for whom they were intended, so as to form part of the personal wardrobe of such person at the time; that a great part of them had been worn before witness returned
42 to this country, but some few had not been worn, because there was no special occasion to wear them. That if the party had been detained in Paris, and cold weather had suddenly come on, the articles were such as witness and her daughters would have required for immediate use, and that if they had remained for the winter, or a month longer, they would have worn the dresses intended for entertainments.

That from the time when these articles were purchased there was nothing to prevent their being put on and worn the moment that a proper occasion for wearing them arrived.

That the articles lasted during the fall and winter until spring, and had been entirely consumed by use.

Upon cross-examination Mrs. Astor further testified that she thought there were four dresses that had not been worn, because there had been no occasion to wear them. That the party had intended at the time the articles were purchased to spend the winter in America, but if their plans had been changed at all,
43 they would have remained in Europe and worn the things there.

That they went to Europe in May or June, 1878, traveled through England and to Paris; then through the Continent and back to

Paris. That most of the articles were ordered upon their first arrival in Paris, before traveling through the Continent, and were paid for on coming back. That most of them (about half, perhaps) were ordered and worn before traveling through the Continent, because they were then needed.

The plaintiff then put in evidence the regulation of the Treasury Department of the United States, which has been in force from 1857 to 1875, as follows, to wit: "Such exemption of wearing apparel cannot be without limit as to the character and quantity of the articles which are to be admitted to free entry; and it is for the department or its officers to determine whether articles for which exemption is claimed are entitled thereto under a reasonable construction of the law.

44 "The rule by which the department usually determines the dutiable or free character of wearing apparel in such cases is as follows:

"1st. Did the owner visit the foreign country for the purposes or with the direct intention of purchasing the article or articles?

"2nd. Were the articles intended for the sole use of the person purchasing the same?

"3rd. Was such purchase actually necessary for the health or comfort of the person or persons purchasing the same?

"These questions must be answered under oath.

Here the plaintiff rested.

The defendant's counsel then called as a witness James C. Welsh, who testified that he was an examiner in the Appraiser's Department of the New York Custom House, and that his duty was to make appraisements of dutiable articles found in passengers' baggage arriving in the port or New York; that he acted as appraiser of Wm. Astor's baggage on the occassion in question; that

45 when the question of wearing apparel came up it was explained to Mr. Astor that new articles of wearing apparel must pay duty, and that witness asked him to give him the bills of such goods as he considered new, and not in use; that he gave certain bills to witness who went through the baggage, verified the bills as well as he could under the circumstances, accepted them as a matter of valuation and made the appraisement; that witness consulted Mr. Astor, from time to time, in regard to whether certain things had been in use, (in the light witness understood it,) and that such things as were clearly in use (to witness' mind), were omitted from the appraisement; that he tried to include only such articles as seemed not to have been worn; that he was governed by his own judgment to come within the spirit of the law, in putting down articles as dutiable, and that he omitted things which seemed to bear evidence of having been worn; that witness understood that most of the articles included in the bills given him by Mr. Astor were new,

46 and that he understood them to be so; that as a matter of opinion witness would say that none of the goods had been

worn, but that it was possible for a dress to have been worn, and to be free from all evidence of wear, and that there were cases where a dress appeared to be perfectly new, but when a lady explained that she had worn it, witness accepted her statement; and the witness further testified as to the gloves that there were unbroken dozens of gloves which had not been worn, and that he had an indefinite idea that most of the gloves were unbroken dozens of gloves.

On cross-examination this witness testified as follows:

"Q. You have said that you have passed free of duty such things as were in use according to your opinion?

"A. Yes, sir.

"Q. And that you passed such articles as came within the spirit of the law as you understand it?

"A. Yes, sir.

"Q. Suppose an article has been worn once, is that in your mind in use, or is it in your mind within the spirit of the law which exempts it?

47 "A. I find where new dresses are presented to me that appear to be new, showing no traces of wear, that they are often claimed to be in use, and I ask ladies and they will say, that dress has been worn. I say, How have you worn it, simply in your dressing room or out in company. They say, well, I have worn it once. That is the usual response; I assume from that, ordinarily, that it has been worn for the purpose of evading the duty; but if a lady says to me, I had it made for a dinner party, and I wore it to a party, or to a reception or to the opera, where it has served the purpose for which it was ordered, then I consider that it has been in actual use according to the spirit of the law, even if worn but once, and I pass it.

"Q. Do you make the line of the distinction to be a once wearing of the article?

"A. If it has been worn in good faith; but if worn in a lady's dressing room simply for the purpose of being able to say that it has been worn, then I do not regard it as coming within the spirit of the law.

48 "Q. Did you ask Mr. Astor anything in regard to these goods having been worn?

"A. No, sir, I did not.

"Q. So that, so far as your action in levying this duty on these articles is concerned, you went upon what you saw.

"A. Upon what I saw, guided by the bills, I went through the trunks and verified them as closely as I could, and I found that the appearance of the dresses corresponded mainly with the idea I attached to the bills, to the understanding that Mr. Astor had in giving me the bills. I asked for the bills in such a way that I assumed that he understood that bills he gave me were all for new goods, and I treated them in that way. I think there were some items on the

goods that I omitted. I think that you will find that the whole amount of the bills is more than the amount of the appraisement.

"Q. I understand, so far as these articles contained in this baggage were concerned, you had nothing to go upon except the bills of valuation and the appearance of the articles themselves,
49 to determine in your mind whether or not they were new. Is that not so?

"A. I should say that was so, my opinion is not infallable.

"Q. You have given very distinctly your motives of what you call the spirit of the law, and you say that, if an article has been purchased for particular occasion, and has been worn on that occasion, you consider that that article was in actual use?

"A. Yes, sir.

"Q. And you illustrate it by a lady procuring a dress to wear to a particular dinner?

"A. Yes, sir.

"Q. Suppose a lady had purchased a dress to wear at that and other dinners, not intending to confine it to the first one, and suppose the person who had invited her had countermanded the invitation, and she left Europe without having attended the dinner and without having worn the dress; what would you consider it to be the spirit of the law as to that dress?

50 "A. I should consider that that was her misfortune.

"Q. And you would charge duty upon that dress?

"A. Yes, sir.

"Q. And that is the way in which you have interpreted this law and applied it to this and and other cases of personal baggage?

"A. Yes, sir."

The witness further testified that at the time of the appraisement he explained his views of the law to Mr. Astor, and that Wm. Astor differed from him in his interpretation of the law, and that witness knew at the time that Mr. Astor intented to protest against the exactness of the duties.

Here the defendant rested.

Plaintiff's counsel thereupon requested the court to charge the jury in accordance with the following requests:

First. The general purpose of the statute being to impose duties upon the importation of *merchandise*, the exemption of the wearing apparel of passengers is in accordance with that purpose, and the language providing for such exemption should have a
51 wide and liberal interpretation.

Second. The general purpose of exempting passenger's baggage being as much in harmony with the statute as the general purpose of imposing duties on merchandise, all language which seems to bring such baggage within the same category with merchandise should be strictly construed against the government, and all language tending to keep up the distinction should be liberally construed in favor of the citizen.

Third. The words "not merchandise" in the clause of the statute now in question, relate to the words "wearing apparel in actual use" as well as to the words "personal effects," and the clause might properly be paraphrased as if it read "wearing apparel in actual use, ("not merchandise,") and personal effects, ("not merchandise.")

Fourth. The words "not merchandise," thus used, may properly be regarded as explaining and defining the words "in actual use," and the clause may be rightly construed as if those were synonymous or correlative terms.

52 Fifth. If, therefore, this wearing apparel was "not merchandise," it was in actual use, within the statutory meaning of that term, and was, therefore, exempt.

Sixth. The words "in actual use," not being scientific or technical words, should be applied in the common and ordinary sense in which they would be generally employed.

If, therefore, this wearing apparel, under the circumstances disclosed in the testimony, would be generally and ordinarily described as being in actual use of the plaintiff and his family, then it should have been admitted duty free.

Seventh. The words "in actual use" do not mean "in actual, immediate, personal use" at the moment, but must have a meaning somewhat more extended than that. The statute clearly shows that some wearing apparel intended for and awaiting use in passenger's trunks as well as that upon his person at the time, is to be admitted free.

Eighth. If the words "in actual use" were intended (as they clearly were) to embrace *some* wearing apparel which was

53 only intented for and awaiting use in the passenger's trunks, there is nothing in the statute which shows an intention to exclude *any* wearing apparel so situated, and consequently all such wearing apparel should be admitted free, provided the other requirements of the statute are fulfilled, viz., that it is "not merchandise," and belongs to the passengers.

Ninth. Wearing apparel is properly and strictly "*in actual use*" from the time when its *use* by its owner begins until it is finally consumed or worn out.

Tenth. The use of wearing apparel which is purchased for the immediate personal comfort of the owner may be properly said to begin from the time when it is sent home from the maker and takes its place, ready for wear, in the owner's wardrobe.

If these articles were in that condition they were "in actual use" within the statute, and should have been admitted free.

Eleventh. There is nothing in the statute to indicate that "wearing apparel" must be worn once or twenty times before

54 it can be said to be "in actual use," and that the jury is not bound by any such test in determining whether these articles were "in actual use" when the plaintiff arrived here in September, 1878.

Twelfth. Wearing apparel suitable for the season of the year which is approaching at the time, not exceeding in quantity what the owner would ordinarily provide for himself and keep on hand for his reasonable wants, and purchased for his own use, as occasion may require, may be properly said to be "in actual use," within the meaning of the statute, from the time when they came in the owners hands and are placed in his wardrobe, to be worn whenever the proper occasion arrives, and if these articles come within that test they should have been admitted free.

Thirteenth. The terms "in actual use," as employed in the
55 statute, are substantially equivalent to the words "in present use," including in their meaning not merely a reference to the actual present, but to so much of the immediate future as a person would ordinarily provide for in his every-day wardrobe, and if, in this sense, these articles were "in actual use" they were exempt from duty.

Fourteenth. All the necessities of modern civilization require that each person should continually renew his wardrobe as articles are worn out. Whatever is purchased for that purpose passes into "actual use" the moment it is sent home and placed by the owner among the other articles which form his present wardrobe; and if these articles were in that category they were exempt from duty.

The court refused to charge the jury in accordance with said requests, or any of them, and the plaintiff thereupon duly excepted to each and every such refusal of the court to find as requested.

56 The court thereupon charged the jury as follows:

The plaintiff, in September, 1878, upon his return from a trip to Europe with his family, consisting of his wife, 3 daughters, and a son, brought into this port, in the trunks of the members of his party, a quantity of wearing apparel, which he had purchased abroad for the personal use of himself and those different members of his family, and not as merchandise.

Upon these wearing apparel the collector assessed the following duties, which the plaintiff paid for the purpose of obtaining possession of his goods:

	Value.	Duty.
45 lbs. woolen and worsted wearing apparel	$990	$418 32
Cotton wearing apparel	150	52 50
Leather gloves	250	125
Silk wearing apparel	2,140	1,284
Total		$1,880

He thereafter, having protested in due form, and being unsuccessful, appealed to the Secretary of the Treasury, brought this
57 action in seasonable time to recover from the collector the amount which is claimed to have been illegally exacted. The plaintiff insists that the articles which have been enumerated

are free from duty under that provision of tariff acts which places upon the free lists "wearing apparel, in actual use, and other personal effects, (not merchandise) professional books, implements and tools of trade, occupation, or employment of persons arriving in the United States." The collector was of the opinion that the articles did not come within the provision, because, in his judgment, although they were the wearing apparel of the plaintiff, for the personal use of his family, yet they were not "in actual use." Certain facts admitted, or have been proved, were not denied.

First. There was evasion or concealment of the amount, or value, or character, and use or no use of the goods by the plaintiff, and there is no complaint of any departure from the courteous treatment by the defendant's officers.

58 Second. There is no dispute in regard to the value of the articles.

Third. It is not denied that the clothing was to be used by the defendant's family in this country during the season then approaching, and was not excessive in quantity for persons of their means, habits and station in life, and was their ordinary outfit for the winter.

Fourth. That a part of the articles had not been worn, and that all were bought for use, and to be worn in this country, if the plaintiff's plans for speedy return should be carried into effect.

The main question in the case, and to obtain an answer to which this suit was brought, is whether, under the foregoing facts, the unworn articles were legally free from duty as wearing apparel "in actual use;" in other words, to ascertain the proper definition of the phrase or term "in actual use."

59 The plaintiff insists that wearing apparel, suitable for the season of the year just approaching at the time, not exceeding in quantity what the owner would ordinarily provide for himself and keep on hand for his reasonable wants, and purchased for his own use, as occasion might require, may be properly said to be "in actual use," within the meaning of the statute, from the time when they came into the owner's hands, and are placed in his wardrobe, to be worn whenever the proper occasion arises.

It is our duty to ascertain, if possible, the intention of the legislature, from the language which is used, and ordinarily to give to the language its natural signification.

In my opinion, by limiting the exemption from duty of travelers' wearing apparel to that "in actual use," Congress meant to say that new and useful wearing apparel purchased in a foreign country, not for present use, but for prospective use in this country, though that the prospective use might be in the near future, should pay duty; and that it is not the right of travelers to have new and unused wearing apparel which has been purchased abroad—not for use abroad, but for use upon their return to this country, admitted free of duty.

60

I therefore limit the exemption in general to wearing apparel which had been actually used, as such, before the arrival of the owner in this country; and define "wearing apparel, actually in use," (not merchandise,) to mean wearing apparel bought for personal use and not for sale, which has been really subjected to use in the way in which the particular wearing apparel is ordinarily used. Apparel bought in a foreign country not for present use, but for the purpose of anticipated use in this country, and not actually subjected to use in a foreign country, for the purpose for which it was procured, but put upon a person as a colorable device to escape duties, is not within the exemption of the statute. Some exceptional cases have been cited by the learned counsel for the
61 plaintiff; and in view of such cases I may also say that the term also includes wearing apparel which has been purchased for the purpose, and with bona fide and not colorable intent of an actual, present, personal wear, and subjected to use in a foreign country or in transit, and not merely for prospective use in this country, although said apparel may not actually have been used abroad. The last clause of the definition is not pertinent, as I understand the testimony to the case on trial.

Under this construction of the statute, the unworn goods of the plaintiff were not exempt. The apparel which had been worn, it not having been claimed that such wearing was colorable or took place in any other than the ordinary way in which clothing was subjected to use, was exempt. And this brings me to the question of fact, which is for the determination of the jury, whether any part of the assessed goods, and if so, how much had been worn?

A juror. Does the clause in this statement which make wearing apparel not in actual use dutiable—is that intended to protect American tailors and dress-makers?

The court. I do not care to state what I suppose to have
62 been the motive of Congress in passing the statute; whether it was for the purpose of protection or for the purpose of revenue. But I think that the intention of Congress was to exclude, so as to prevent travelers from buying new articles of wearing apparel abroad, and not paying duty upon them. It was to prevent that. Whether they meant to protect any one trade or any one class of artisans, I do not know.

Gentlemen of the jury: Under the construction of the statute which I have given to you, and which, for the purpose of this trial, I give you, the unworn goods of the plaintiff were not exempt. The apparel which had been worn, it not being claimed that such wear was colorable, or took place in any other than the ordinary way which clothing is subjected to, was exempt. And this brings me to the question of fact, which is for your determination.

The plaintiff claims that under the limited construction which I have given to the statute, that the collector levied a duty upon worn apparel; that is to say, that the officer, through mistake, classified

too large a quantity of the apparel as unworn. If this is true, the plaintiff is entitled to a verdict for the amount which he
63 has been compelled to pay upon the apparel which had been worn. Upon this part of the case the plaintiff takes the burden of proof, the presumption being in favor of the action of the collector.

Wm. Astor testifies that some of his own and his son's clothing has been worn; he knows nothing in regard to the ladies' apparel; and he is also of an opinion, from the correspondence of the amount of the bills for the clothing and the assessments, that the assessment was substantially upon the entire amount which he bought. I believe it is denied by the defendant that these two amounts do correspond accurately. Mrs. Astor says that she should think half of the ladies' clothing in amount had been worn. The plaintiffs claim that the testimony on this part of the case is uncontradicted and is direct.

The appraiser says that he endeavored to ascertain by inspection in regard to the worn or unworn clothing, and put no assessment upon the former class. That from his conversation with the plaintiff, that he supposed that the bills were handed him as his guide
64 for ascertaining how much new clothing there might be; that he understood that the plaintiff claimed as a matter of law that all the goods were exempt, while his duty, on the other hand, was to classify the worn and unworn goods separately as well as he could, with the lack of facilities for examination at hand; that he was aided or guided in his examination by the fact that he supposed the bills were handed him to show which of the articles were new and unworn. The defendant claims, by his counsel, that the plaintiff does not point out with any precision what part or how much of the clothidg had been worn; that he, therefore, had no data upon which to found a conclusion in his favor. In this part of the case the evidence on neither side is very detailed and positive. Each witness evinced a proper distrust of the accuracy of memory in regard to facts which occurred two years ago.

Your duty is to examine the testimony on both sides and ascertain whether the plaintiff has proved that any, and if so, how many of his worn articles were assessed for duty? The amount, if anything, which he has overpaid, is the measure of the defendant's liability. If you find for plaintiff, you will re-
65 turn a verdict for the principal sum, with interest from September 23rd, 1878. The clerk will make the computation when judgment is entered.

I suppose it is conceded that some were not worn; the amount, if anything, which he has overpaid, that is, the amount, if anything, which he has paid upon worn goods, is the measure of the defendant's liability.

The plaintiff excepted to the following portions of the charge:

1. That although the clothing in question was confessedly not

excessive in quantity for persons of the means, habits, and station in life of the plaintiff and his family, and was their ordinary outfit for the winter, the exemption of wearing apparel from the payment of duty was limited "to wearing apparel which had been actually used as such before the arrival of the owner in this country.

2nd. That the terms "wearing apparel in actual use, (not merchandise), as contained in the statute, "meant wearing apparel
bought for personal use, and not for sale, which has been
66 really subjected to use in the way in which that particular
wearing apparel is ordinarily used."

3. That "the unworn goods of the plaintiff" in this case were not exempt.

The jury thereupon rendered a verdict for the plaintiff for the sum of seven hundred and thirty-seven dollars ($737), with interest from September 23rd, 1878.

And inasmuch as the foregoing several matters of law and fact, and the said several exemptions taken and made as aforesaid in the course of said trial, do not appear upon the record of the trial, therefore, on the prayer of the plaintiff, by his counsel, the said judge has signed the foregoing, as and for the bill of exceptions in this cause, as of the 28th day of October, 1878.

Settled as above.

W. SHIPMAN, *Judge.*

(Endorsed:) 5,733. U. S. Circuit Court, Southen Dis-
67 trict of N. Y. William Astor agst. Edwin A. Merritt.
Plaintiff's proposed bill of exceptions as amended as settled. Lord, Day & Lord, plff's attorneys, 120 Broadway, New York. Received, U. S. attorney's office, Feb. 5, 1881.

To Stewart L. Woodford, Esq.

SIR: You will please take notice that within is a copy of the plaintiff's proposed bill of exceptions in this action.

Dated New York, Feb'y 5th, 1881.

U. S. Circuit Court. Filed July 25, 1881.

JOSEPH M. DEUEL, *Clerk.*

68 Supreme Court of the United States.

WILLIAM ASTOR, PLAINTIFF IN ERROR,
against
EDWIN A. MERRITT, DEFENDANT IN ERROR.

Of October Term, in the year of our Lord one thousand eight hundred and eighty-one.

Afterwards, to wit, on the second Monday of the October term, in the year of our Lord one thousand eight hundred and eighty-one, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said William Astor, by Lord, Day and Lord, his attorneys, and says that in the

record and proceedings aforesaid there is manifest error in this, to wit:

That the court erred in refusing to charge the jury in accordance with each and every one of the fourteen requests to charge
69 presented by the plaintiff's counsel upon the trial.

Said requests are contained in the bill of exceptions as settled herein and are hereby referred to and form part of this assignment of errors.

Also in this, that the court erred in charging the jury that, although the clothing in question was confessedly not excessive in quantity, for persons of the means, habits, and station in life of the plaintiff and his family, and was their ordinary outfit for the winter, the exemption of wearing apparel from the payment of duty was limited to wearing apparel which had been actually used as such before the arrival of the owner in this country.

Also in this, that the court charged the jury that the terms "wearing apparel in actual use, (not merchandise)," as contained in the statute, meant "wearing apparel bought for personal use, and not for sale, which had been really subjected to use
70 in the way in which that particular wearing apparel is ordinarily used."

Also in this, that the court charged the jury that the "unworn goods of the plaintiff" in this case were not exempt.

Also in this, to wit: In each particular pointed out by the exceptions taken by the plaintiff's counsel upon the trial.

And this the said plaintiff, by said attorneys, is ready to verify.

Wherefore he prays that the judgment aforesaid, for the errors aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he may have lost by reason of said judgment.

LORD, DAY & LORD,
Attorneys for Plaintiff in Error.

(Endorsed:) U. S. Supreme Court. William Astor *vs.*
71 Edwin A. Merritt. Assignment of errors. Lord, Day & Lord, attorneys for plaintiff in error, 120 Broadway, New York. U. S. Circuit Court. Filed July 29, 1881. Joseph M. Deuel, clerk.

Due service of the within is hereby admitted.
July 29, 1881. STEWART L. WOODFORD,
U. S. Att'y, for Deft.

72 Supreme Court of the United States.

WILLIAM ASTOR, PLAINTIFF IN ERROR,
against
EDWIN A. MERRITT, DEFENDANT IN ERROR. } Joinder in error.

And afterwards, to wit, on the second Monday of October, 1881,